

‘An Enterprise of the Imagination’

Tuning in to James Boyd White’s Transformative Constitutionalism

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Contents

Acknowledgements	v
Abstract	vii
INTRODUCTION	1
<i>Appendix: Composition</i>	A 1
Activity	19
Alienation	49
Analogy	75
Attention	97
Attunement	123
Belief	143
Concepts	157
Constitution	173
Equality	195
Experience	219
Hope	241
Image	265
Imagination	291
Integration	319
Justice	345
Listening	371
Metaphor	389
Questioning	409
Rationality	435
Rhetoric	459
Voice	481
CONCLUSION	511
Bibliography	533
Index	547

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Abstract

This Thesis engages with the work of James Boyd White. White's principal books, which cannot be placed easily into conventional categories, give particular attention to an activity that we humans do all the time: constituting and reconstituting ourselves and our relations with others when we use, and in using transform, our language. Attending to this activity, which I call 'transformative constitutionalism', opens up a line of inquiry into the kinds of selves and relations that we do, and could, and should constitute. This inquiry lends itself to talking about justice as being concerned with constituting appropriate selves and relations. White's own inquiry, which resists monophonic speech and advocates polyphonic speech, has gone down this particular path. This Thesis seeks to make sense of his travel and to provide a resource for tuning in to it.

At one level, this Thesis can be read as a response to an invitation in White's course book *The Legal Imagination*. Here White offers this 'thesis': 'that the activities which make up the professional life of the lawyer and judge constitute an enterprise of the imagination, an enterprise whose central performance is the claim of meaning against the odds: the translation of the imagination into reality by the power of language.' White invites 'examination and response' from his reader. This Thesis takes up White's invitation.

Following White's encouragement, I speak out of an awareness of several sorts of material, including the literature of the law, literary criticism, my intellectual activity outside the law, and my ordinary experience of life. Doing so offers a way of defining what he calls 'intellectual integration', the concern of which is wholeness of thought and experience. For White, intellectual integration can serve as a model for social integration. It is pertinent to note that the phrase 'transformative constitutionalism' has been drawn from post-apartheid legal commentary.

There is a sense in which this Thesis is continuous with my work as an academic economist. Several strands of White's work seek to resist economic imperialism, strands that I bring together and extend. In doing so, an argument is made for re-imagining 'the economic' to facilitate a re-imagining of 'the legal'.

Attempts have been made to find mechanisms for the maintenance of justice which would dispense with the need for human attention. It cannot be done.

– *Simone Weil*

Introduction

‘I never lost hope that this great transformation would occur.’ Those words come from Nelson Mandela’s *Long Walk to Freedom* (1994), just after a description of his inauguration as President.¹ In 1996, before a crowd in Sharpeville (scene of the infamous massacre in 1960 by the apartheid security forces), President Mandela signed the Constitution,² a major landmark in efforts to create a democracy worthy of the name. In 1997, the Chief Justice designate, Ismail Mahomed, suggestively spoke of the place of the law in the then dramatically changing society:

I hope that I will be able to contribute to the urgent need to salvage the image of the law so that it in fact is, and is properly perceived to be, a friend and protector of the people instead of an instrument of racial, gender or political oppression. It is only through the restoration of the legitimacy of the law that law can play its most important role in bringing justice to the people and restoring the moral fabric of our society so tragically damaged for so long by the pain and shame of our racial past.³

We might say that ‘the law’ during apartheid, notwithstanding traces of the rule of law, became profoundly authoritarian and no longer authoritative (without ‘legitimacy’) and that Mahomed seeks to join his fellow citizens, ‘the people’, in rectifying this. To this end, he would have us resist any suggestion that ‘law’ and ‘justice’ can be segregated, at least in the sharp sense that the ‘racial past’ sought to keep apart white and black.

The formal efforts to break away from apartheid have come to be commonly called ‘transformative constitutionalism’.⁴ In a lecture given in 2006, Chief Justice Pius Langa offered this suggestive image of transformative constitutionalism:

¹ N Mandela, *Long Walk to Freedom* (1994) 615.

² Constitution of the Republic of South Africa Act 108 of 1996.

³ Quoted in E Kahn, ‘Appointment of Justice Ismail Mahomed as Chief Justice’ (1997) 114 *South African Law Journal* 197, 206.

⁴ An early and influential usage of the phrase resides in K E Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146. For a suggestive critical reading of

Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant.⁵

‘Transformation’ here calls for imaginative creativity. A key question for the new South African legal order is this: What are the realizable ‘ideal’ possibilities?

* * *

That question could be meaningfully engaged with not just in South Africa but in any country. To whom might we turn for assistance in responding to it? That question is my point of departure to the work of James Boyd White.

In 2008, White retired from the University of Michigan, where for over two decades he had the titles of Hart Wright Professor of Law, Professor of English, and Adjunct Professor of Classical Studies. Much of his work defies simplistic placement within conventional classifications. Whilst he has largely written to the general reader – who might be thought of as one of ‘The People’ – White has been read by specialists from a variety of disciplines, including anthropology, economics, law, literary criticism, philosophy, political science, and theology. He commonly invites his reader to attend to an activity we humans do all the time: *constituting and reconstituting ourselves and our relations with others when we use, and in using transform, our language*.⁶ Attending to this activity, which I call ‘transformative constitutionalism’, opens up a line of inquiry into the kinds of selves and relations that we do, and could, and should constitute. This inquiry lends itself to talking about justice as being concerned with constituting appropriate selves and relations. White’s own inquiry has gone down this particular path. This Thesis seeks to make sense of his travel.

White has been a prolific writer. During an interview, which was published by the *Michigan Law Review* (2007) as part of a collection of contributions marking his retirement, White provided this brief summary of his major works:

Klare’s essay, see T Roux, ‘Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference’ (2009) *Stellenbosch Law Review* 258.

⁵ P Langa, ‘Transformative Constitutionalism’ (2006) 3 *Stellenbosch Law Review* 351, 354.

⁶ I have drawn from White’s terminology, as will soon become obvious.

Each of my principal books focuses on a particular activity of mind and language: in *The Legal Imagination* it is the activity of learning to speak and think like a lawyer; in *When Words Lose Their Meaning* it is the compositional activity in which we engage when we work with the language of our culture, laden as it is with value and presupposition, to try and create meanings of our own and to establish constructive relations with other people too; in *Justice as Translation* it is the activity of translation, of which interpretation is an important form, especially the kind of interpretation represented in the judicial opinion; in *Acts of Hope* it is the activity of claiming external authority for one's judgments, in the law and elsewhere, an activity by which one reconstitutes the source of authority in one's writing; in *'This Book of Starres': Learning to Read George Herbert* it is the activity of learning the language of another mind, in this case that of the poet Herbert; in *The Edge of Meaning* it is the activity in which we seek to imagine the world, and ourselves and others within it, in such a way as to permit us to claim meaning for our experience; in *Living Speech* it is the activity of struggling to understand the empire of force, in the world and in ourselves, and to learn how to stop respecting it.⁷

In each of these books,⁸ White has much to say and suggest about the significance of language in human life. In particular, he regards 'the relation of the mind to language as problematic, seeing language as both a friend and an enemy, giving us enormous capacities for thought and life but also restraining and sometimes misleading us.'⁹ These books, along with various essays, some of which can be found in *Heracles' Bow* (1985) and in *From Expectation to Experience* (1999),¹⁰ can be read as a sustained challenge to those who live by a mechanistic image of language, which reduces humans to machines, possibly in the service of 'the empire of force'. The challenge, I suggest, is also an invitation to his reader to consciously engage in the activity of transformative constitutionalism in the various communities of discourse where she or he is active, in the pursuit of acting justly.

⁷ 'Interview with James Boyd White' (2007) 105 *Michigan Law Review* 1403, 1417. ('Interview'.)

⁸ The full titles and publications dates of the books are as follows: *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (1973), *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (1984); *Justice as Translation: An Essay in Cultural and Legal Criticism* (1990); *Acts of Hope: Creating Authority in Literature, Law, and Politics* (1994); *'This Book of Starres': Learning to Read George Herbert* (1994); *The Edge of Meaning* (2001); *Living Speech: Resisting the Empire of Force* (2006).

⁹ 'Interview' 1417.

White's guiding question throughout his work is this: 'How is one to manage the relation with the language one is given by one's culture to use?'¹¹ The question is an uncommon one, to say the least. A possible source of misunderstanding on the part of a number of his critics in law-centered circles may reside in the fact that he is concerned with a question that seems to have no conscious existence for them at all.¹² Why might the question be non-existent? Consider this passage from *When Words Lose Their Meaning* concerning self-language relations:

We are in part the product of our language, but each time we speak we remake it. This reciprocity is so deeply embedded in our experience that it is hard to recognize it. As we grow up in the world, our experience is formed by the language in which it is presented and talked about, and this language becomes so much of the part of the mind as to seem a part of nature. One is perpetually telling one's story to oneself and others, trying to shape things so that the next step fits with what has gone before, ceaselessly claiming significance for one's experience and actions, and the question always is, in what language can (or must) one do these things? What are the implications—the adequacies and inadequacies—of our common ways of describing the world, of constituting relations, of feeling injury, of acting socially, and of aspiring to what is not yet? The language marks the mind, and one will normally see that one's language is contingent, not necessary, only if one experiences a basic cultural dislocation: the sense that words have lost their meaning.¹³

Such a 'dislocation' is not conventional material for law talk, at least in America. ('That's mushy cultural studies, not serious law.') The self-language 'reciprocity' White speaks of challenges some basic assumptions underlying the realities that many people take for granted. The significance of White's guiding question perhaps would be more widely appreciated in countries such as South Africa where there has been and continues to be 'a basic cultural dislocation'.

A significant moment in this dislocation is Nelson Mandela's statement from the dock in the Rivonia Trial, in which he admitted that he was the leader of Umkhonto

¹⁰ J B White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (1985); *From Expectation to Experience: Essays on Law & Legal Education* (1999).

¹¹ 'Interview' 1417.

¹² In saying this I am echoing a remark by Lon Fuller, who was trying to make sense of 'misunderstanding' between himself and Thomas Reed Powell. See K I Winston (ed), *The Principles of Social Order: Selected Essays of Lon L Fuller* (1981) 297.

¹³ *When Words Lose Their Meaning* 276-77.

we Sizwe (The Spear of the Nation) and had planned sabotage. White engages with his statement in *Acts of Hope*. Here is a summary fragment:

Mandela's task in this speech as a whole is to justify the acts of violence engaged in by Umkhonto and approved by him. He does this . . . by a process of transformation so profound as to become an inversion: he describes the history and motivation of the A.N.C. and Umkhonto, and the responses of the government, in a way that both strips the government of the claim to be a supporter of civilization, which normally goes with an appeal against violence, and transfers it to the A.N.C. and Umkhonto. The government is not on the side of the law, or justice, or order, or civilization, or democracy; it is lawless, violent, barbaric; it rules by terror, with no claim whatever to the sort of moral standing usually assumed by those who oppose violence. On the other side, Mandela and Umkhonto are the embodiment of civilization—including a large element of Western European civilization—defending itself against barbarism. Sabotage is thus not an instrument of terrorism, as one might at first be inclined to think, threatening the dissolution of civilization; it is a sensible and moderate step taken to prevent a further slide into moral and political degeneration. The state has become the criminal: the criminal the statesman.¹⁴

That which White identifies as 'a process of transformation so profound' is an extreme example of what is commonplace, for '[a]ll of us transform our languages all the time'.¹⁵ The question is not whether linguistic-cultural transformation happens: it does. Instead, the question concerns its quality and direction.

Shall we compare White's transformative constitutionalism to . . . ? Drawing an analogy may be a helpful here, not the least for giving more content to the phrase 'transformative constitutionalism'. White can be read as working in a tradition of 'literary' constitutionalism that runs through Edmund Burke, who has an important place in *When Words Lose Their Meaning*. In a reading of *Reflections on the French Revolution* (1790), White has this to say about Burke's composition:

The form of the text is literary [I]t is circular or spiraling in shape. The reader finds himself returning again and again to the same questions, but on each new encounter he finds them transformed by the text that defines them. This text moves not by proof and

¹⁴ *Acts of Hope* 291-92.

¹⁵ *Ibid* 226.

demonstration, from proposition to proposition, but through a process of repetition and transformation, and the language thus made becomes more complete and familiar. This means that the reader is not asked to move from one general proposition to another, checking fact against fact, logic against logic; instead, he is immersed in a world like the real world, in which judgments of fact and reason and value are continuous and where the questions that are asked are not merely general and not merely particular but both at once, as questions of statesmanship and citizenship always are. Burke starts where life starts, with the world as it is, and he speaks a language of criticism and feeling and judgment, a language for movement and life within the world he creates. To make one's way in the world this text creates, one must learn its language. That is how it teaches.

In such ways as these Burke in this text offers his reader a 'British Constitution' that is at once a version of the world that is England and a way of maintaining and improving it, since for him 'constitution' has the force not only of a noun but of a verb: it is a structure of relations that includes the method of its own change, an activity in which we all engage. And since this activity is necessarily individual in character, the 'British Constitution' of which Burke writes, and which he wishes to improve and to perpetuate, is in its deepest form internal (as well as external) to the reader; it is a way of making and remaking identity and community through language.¹⁶

What White says in this passage about Burke's text can be applied to his own. *When Words Lose Their Meaning* and White's other books have a 'literary' quality. He starts where Burke starts, which is not unitary and isolated and alone with blank paper but with inherited languages and with decisions to make with regard to what kind of communities to constitute in our engagement with them. Not one to separate 'fact' and 'value', White 'speaks a language of criticism and feeling and judgment, a language for movement and life within the world he creates.'

* * *

By my reading, a number of White's critics have failed to do his work justice. Names that immediately come to mind include Richard Posner, Stanley Fish, Susan Mann, Mark Tushnet, Sanford Levinson, Susan Heinzelman, and Emily Hartigan. This Thesis seeks to identify various acts of injustice as part of an attempt to do justice. 'Justice' here, following Simone Weil, who may be taken to be one of White's models

¹⁶ *When Words Lose Their Meaning* 218.

for unsettling conventional classifications, involves a certain kind of ‘attention’.¹⁷ This attention can be thought of as process of attunement, or tuning in. For the purpose of suggesting what is meant by ‘attunement’, let us briefly engage with one of White’s critics. Here is a part of what Stanley Fish says about White’s approach to law, as expressed in *Heracles’ Bow*:

White defines the law (correctly in my view) as ‘a set of resources for thought and argument.’ This set, he argues, is open and includes the concepts thought to be basic to the enterprise. As a result, the law is at every level creative, constructing its principles even as it applies them. . . . White . . . loses me when his description of the way the law works leads to a demand for a new form of legal practice: ‘This means that one question constantly before us as lawyers is what kind of culture we shall have.’ But the question ‘before us’ is always a legal one, couched in terms of legal categories and possible courses of action. The fact that a legal question can always be shown to have a source in presupposed cultural values does not mean that it is the business of legal inquiry to discover or revise those values. Of course one could always engage in that business, but to do so would not be to practice law as the institution’s members now recognize it. White himself makes the point when he observes again and again that the workings of the law are local; ‘it always starts in a particular place among particular people,’ and therefore ‘one cannot idealize’ it by saying ‘here is how it should go in general.’ But here is White, idealizing it and saying how it should go in general: it should provoke a continuing philosophical discussion of the society’s values and goals. But were it to do that, it would not be law but moral philosophy; the irremediably local perspective of the law – its rootedness in particular disputes requiring particular, and timely, solutions – leaves no room for the extended reflections White recommends and indeed brands them as inappropriate. The judge who was always stopping to ‘put his (or her) fundamental attitudes and methods to the test of sincere engagement with arguments the other way’ would not be doing his or her job as a judge, but would be doing something else, something valuable no doubt but, in legal terms, something inept and even irresponsible¹⁸

¹⁷ S Weil, *First and Last Notebooks* (trans R Rees) (1970) 351. For suggestive remarks on the place of attention in Weil’s approach to justice, see R H Bell, *Simone Weil: The Way of Justice as Compassion* (1998) 47-51, 152-56. As discussed later, Weil’s approach to justice has an important place in White’s work, especially *Living Speech*.

¹⁸ S Fish, *There’s No Such Thing As Free Speech and it’s a Good Thing, Too* (1994) 172-73 (footnotes omitted).

In opposition to Fish, White arguably seeks to contribute not to 'a new form' but to a *transformation* 'of legal practice'. For White, that which we call 'the law' is a medium through which justice is pursued, a medium that is in a continual process of becoming, and he is simply inviting us to attend more fully to this process and to join him in helping realize certain existing potentialities. Fish has failed to attune himself to this *becoming* and to the importance White places on it. This failure may be connected with the way he seems to imagine sharply separate activities of 'law' and 'moral philosophy'. This imagining seems to be partly influenced by his separation of the categories 'legal' and 'cultural', a separation that White would complicate.

What might it require for Fish to tune in to White's work, in the sense that Fish could say not 'White . . . loses me' but 'I now think I have come to a reasonable understanding of White's image of law, to the extent that . . .'? He would need to do much more than simply adjust his definitions of several words, such as 'cultural', 'legal' and 'practice'. For each of these words is connected to others, which are connected to others, which are connected to others, and so on. The task at one level is somewhat akin to that of a piano tuner. A good piano tuner does more than simply use an electronic instrument to adjust the pitch of each key. She or he tunes the keys to harmonize with all the other keys, and this requires repeated back and forth tuning of each key.¹⁹ In the quest for a plausible harmony with White's image of the law, Fish would need to similarly attune his language, keywords of which, by my reading of his work, include the following: belief, consciousness, experience, hope, theory. These words are not trivial ones. For any person, modifying their meanings will have profound consequences, some of which are addressed in this Thesis.

* * *

In an endeavour to try and catch something of the 'The People'-orientated spirit of White's work, this Thesis is written to the general reader. This direction has presented a challenge for the writer, given that the conventions and regulations that guide its composition will direct it to a reader who is an authority on White's work. An attempt

¹⁹ This piano analogy comes from H Bai, 'Autonomy Reconsidered: A Proposal to Abandon the Language of Self- And Other-Control And to Adopt the Language of "Attunement"' (1998) *Philosophy of Education* 95, 99.

has been made to find a way to pitch the work so that both readers have a meaningful place here as readers.

White is not a quick read. To 'read' White's work one must learn the language in which it is composed. This Thesis is written to assist and to talk about the learning process. To this end, an alphabetical 'lexicon' has been composed. Many of the 'entries', for want of a more fitting word, connect with others. (A significant cross-reference is marked with an asterisk.) There is no single road for reading them, but many possible roads. Select a road that interests you. Change if the going is awkward.

* * *

At one level, this Thesis can be read as a response to an invitation in *The Legal Imagination*. In the penultimate chapter of his course book, White offers this 'thesis': 'that the activities which make up the professional life of the lawyer and judge constitute an enterprise of the imagination, an enterprise whose central performance is the claim of meaning against the odds: the translation of the imagination into reality by the power of language.'²⁰ This Thesis is to a significant extent a response to White's thesis. What does White mean by 'an enterprise of the imagination' and by 'the translation of the imagination into reality by the power of language'? White invites an 'examination and response'²¹ from his reader. How is this to be done justly?

White's thesis can be taken to be part of a certain kind of argument, one that resembles that offered by the ancient Greek poet Homer in the *Iliad*. In *When Words Lose Their Meaning*, White has this to say about the *Iliad*:

In a way, the poem as a whole . . . takes the form of an argument. By this I do not mean argument in the ratiocinative sense of a thesis supported by propositions, from which it can be said to proceed by the rules of logic or by the laws of probability, but argument as an activity of critical engagement, a definition of resources and a testing of limits that results in the creation of a new position, taken by the writer and offered to the reader. An argument goes on in the text, but its method is closer to that of music than debate. . . . The reader moves from one world to the other and back again, and the movement invites comparison and judgment. . . . The art of this poem is thus an art of composition in the literal sense, an art of putting together to make a design. It constitutes an original and creative kind of

²⁰ *The Legal Imagination* 758.

thinking about the world, one that proceeds by poise and contrast, that moves by placing one thing against another and making a third, and thus criticizes what it makes. The meaning of the poem, which is different from the meaning of any of its parts or their sum, is found in the experience of its movement in sequence and in time. What starts out as one thing turns into another, and the life of the poem is in that movement.²²

What White says here about Homer's work suggests a great deal about his own. In each of his principal books, White invites his reader to move from 'one world to the other and back again, and the movement invites comparison and judgment.' Part of the art of his own work is an 'art of composition'. This Thesis seeks to identify aspects of this art. This will be done with explicit descriptions and with an attempted imaginative composition.

The composition of this Thesis reflects some suggestions in White's course book. In *The Legal Imagination* White encourages the student to draw from a variety of sources. Here is one expression of encouragement:

The student . . . is asked to speak out of an awareness of four sorts of material: the literature of the law, the introduction to literary criticism this book is meant to afford, his intellectual activity outside the law, and his ordinary experience of life. The premise upon which we operate is that the activity called the law can be seen as an activity of the imagination, an activity that creates and uses a literature which we are interested in assessing – what is the state of the legal imagination in America? – and to which the student is asked to contribute, feeling free to bring into play anything that he knows or is. The questions and assignments in this book, therefore, do not ask for answers of the sort that the questions in a property book might be said to call for, but rather are meant as occasions for the play of the individual mind and imagination, as invitations to talk. The student is addressed and asked to speak not as a student but as an independent mind.²³

An attempt to bring together the 'four sorts of material' can be imagined to be in the service of an activity that the philosopher Bernard Lonergan calls 'self-

²¹ Ibid.

²² *When Words Lose Their Meaning* 41-44.

²³ *The Legal Imagination* xx-xxi.

appropriation',²⁴ which requires 'knowing' the answer to the question 'what am I doing as I am knowing?''²⁵ (As far as I am aware, White makes no reference to Lonergan,²⁶ who can serve as an excellent model for unsettling conventional disciplinary classifications.²⁷) Suffice it to say here, to self-appropriate is to experience, understand, and judge oneself as a knower.

Bringing together the 'four sorts of material' will face the challenge of resisting conventional disciplinary boundaries. We may readily imagine a boundary guard saying something like: 'Literary criticism has no serious place in the law.' In the same segregative spirit: 'Let us not mix personal "ordinary experience" and professional legal experience.' The suggested boundaries, to be sure, are not fixed entities but fluid cultural artifacts that can be reconstituted with what White calls 'the play of the individual mind and imagination'. We can be sure that this 'play' includes developing the capacity to distinguish voices: How does a student know when she (or he) is speaking 'as a student' rather than 'as an independent mind'? Might she be impelling the teacher to speak as a teacher rather than as an independent mind? (As the philosopher-sociologist Peter Berger remarked, 'we become what we are addressed as by others.'²⁸)

* * *

Some words may be helpful about my early encounters with White's work, not the least because there is a connection with the direction of this Thesis. In 1992 I completed an economics master's thesis titled *Acid Rain and Economic Policymaking*, which explored 'the tension between the widely held belief in the efficacy of the "free-market" and the increasing concern about environmental degradation from economic activity.'²⁹ I gave particular attention to the limits of conventional economic theory,

²⁴ B J F Lonergan, *Insight: A Study of Human Understanding* (1957). He begins his use of and discussion on the term 'self-appropriation' in the Introduction.

²⁵ For a discussion of the significance of 'self-appropriation' in a legal context, see P M Brennan, 'Realizing the Rule of Law in the Human Subject' (2002) 43 *Boston College Law Review* 227, 292, 300, 317, 318. Brennan makes explicit connections between Lonergan's work and White's.

²⁶ For suggestive connections between Lonergan and White in addition to those suggested by Brennan (ibid), see G A Kalscheur, 'Law School as a Culture of Conversion: Re-imagining Legal Education as a Process of Conversion to the Demands of Authentic Conversation' (1996) 28 *Loyola University Chicago Law Journal* 333.

²⁷ See, for example, H A Meynell, *An Introduction to the Philosophy of Bernard Lonergan* (1976).

²⁸ Quoted in P McShane, *Introducing the thought of Bernard Lonergan* (1968) 10.

²⁹ R Dawson, *Acid Rain and Economic Policymaking*, M Com Thesis, University of Auckland (1992) 1.

which omits the inescapable role of the state in making laws relating to benefits and burdens of pervasive interdependencies between people. My work drew from the work of several economists who have sought to do economics in a new key,³⁰ including Warren Samuels. In one of his works, *The Legal-Economic Nexus* (1989), Samuels wrote:

James Boyd White, commenting on the falseness of the distinction between the market and government, has stated that to ‘talk about “government intervention”’ implicitly assumes ‘that there is a pre-governmental state of nature called the market into which the government intrudes. But this is obviously silly.’³¹

Obviously silly indeed! This James Boyd White sounded to me to be worth reading, not the least as a resource for thinking critically about what it means to ‘think like an economist’. I acquired a copy of the lecture from which Samuels quoted, and I found myself reading and rereading it with great interest.

White’s lecture, which approaches economics and law as ‘two cultures in tension’, begins as follows:

I want to preface my remarks by saying something about the kind of talk this is going to be. As my title says, I shall speak mainly about economics and law, which I shall examine as forms of thought and life, or what I shall call cultures. With law, about which in fact I shall speak rather briefly, I am naturally familiar by training and experience. But with economics I am familiar only as an observer—as a general reader who reads the newspaper, as a lawyer who has followed a little of the law and economics literature, and as one who has lived among those interested in the field. I thus speak about it as an outsider, and, as you will see, I speak largely about features of economic thought that I find disturbing. What I say, then, should be taken as tentative, subject to correction and response from those who know what I do not. In this sense the work I am offering you is unfinished. On the other hand, it does reflect a good many years of thinking about these questions, and it says what I think. It is

³⁰ The musical metaphor draws from S K Langer, *Philosophy in a New Key: A Study in the Symbolism of Reason, Rite, and Art* (1942).

³¹ W J Samuels, ‘The Legal-Economic Nexus’ (1989) 57 *George Washington Law Review* 1556, 1568. White’s words come from his ‘Economics and Law: Two Cultures in Tension’ (1987) 54 *Tennessee Law Review* 161.

tentative, then, not in the sense that I do not mean what I say, for I do, but in the sense that I recognize that about much of this I might someday have to change my mind.³²

For me there was (and still is) something very intriguing about this beginning. From what I recall of an early reading of it, I sensed that this 'outsider' was 'offering' some words that could serve as a productive challenge to 'insiders'. (This challenge may be thought of as having several intertwined layers, one of which has to do with what we call 'style'. White addresses his reader in a manner that is more direct – especially the words, 'I am offering you' – than is conventional in an academic journal. Might this manner be part of the life of 'an independent mind'?) After several readings of the lecture I felt compelled to offer a 'response', some of which could be a contribution to help complete what is 'unfinished'. Several parts of this Thesis directly relating to economics may be taken as a response.

In my capacity as an academic economist, I continued to read White because he provided considerable material that could serve as a resource for augmenting lines of inquiry pursued by Samuels and a collection of other 'new key' economists – including Kenneth Boulding, John Commons, Sheila Dow, Peter Earl, Geoffrey Hodgson, Arjo Klamer, Deirdre McCloskey, Gunnar Myrdal, Amartya Sen, George Shackle, Janet Seiz, Diana Strassmann, among others. In diverse ways, these economists offer to assist in the fashioning of a more 'reflexive' economics,³³ an economics that has a place for taking 'culture', including the many cultures in economics (or 'schools of thought', to use the common phrase) seriously. To put it differently, these economists challenge certain features of mechanistic thought and expression that are at the core of a supposedly culture-free economic imperialism. (Some of my former colleagues who live by the machine metaphor identified their work as being concerned with the 'hard' knowledge of science, which they set in opposition to my interest in the 'soft' knowledge of humanities.) After several years of trying to do similar challenging, I

³² Ibid.

³³ For a suggestive discussion on the word 'reflexive', a discussion addressed to anthropologists and sociologists, see R Hertz, 'Introduction: Reflexivity and Voice' in R Hertz (ed) *Reflexivity & Voice* (1997) vii-xviii. The following fragments may be helpful: '[T]he reflexive ethnographer does not simply report "facts" or "truths" but actively constructs interpretations of his or her experiences in the field and then questions how those interpretations came about' (viii). 'The outcome of reflexive social science is reflexive knowledge: statements that provide insight on the workings of the social world *and* insight on how that knowledge came into existence' (ibid). 'By bringing subject and object back into the same space (indeed,

sensed that there were very limited opportunities for me to do a meaningful economics and that law school was the place for me. By my reading of White's *The Legal Imagination*, this crossing need not be a termination of my work in economics, for it could be a broadening and deepening of it. (Thinking critically about 'thinking like a lawyer' could serve as a resource for more thought about 'thinking like an economist'.) In short, an economics that could be done in the service of a constructive transformative constitutionalism might strongly resemble law in the same service. My engagement with several economists in this Thesis is intended as part of an argument along these lines. The argument is made for re-imagining 'the economic' to facilitate the re-imagining of 'the legal'.

My doctoral work in economics, a significant part of which was published in 2001,³⁴ centered on the organization and control of the fisheries in New Zealand. I gave particular attention to disputes over the meaning of the *Treaty of Waitangi* (1840), especially the way language shapes images of issues, events and problems. In 2002, whilst teaching economics at the University of Waikato, I accepted an invitation from the Department of Political Science and Public Policy to teach a course titled 'Politics of Maori and Other Indigenous Peoples'. During the course, we found ourselves explicitly attending to political and ethical questions relating to the way we should talk. To aid discussion I circulated a couple of White's essays. Several students identified White's 'voice' talk along with his efforts to integrate 'the personal' and 'the professional' as resembling the direction of many 'Indigenous' scholars, including Linda Tuhiwai Smith's *Decolonizing Methodologies* (1999).³⁵ Discussions about the resemblance provided me with a new take on White and with some food-for-thought on the problematic opposition of style versus substance. Since teaching the course I have tried to keep in touch with several strands of Indigenous scholarship, not the least for assistance in working out how to best talk about 'substance', among other words from the 'Stance family' – including 'constitution'.³⁶ One recent work is

even the same sentence), authors give their audiences the opportunity to evaluate them as "situated actors" (i.e., active participants in the process of meaning creation' (ibid).

³⁴ R Dawson, *The Treaty of Waitangi and the Control of Language* (2001).

³⁵ L T Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (1999).

³⁶ The phrase 'Stance family' comes from K Burke, *A Grammar of Motives* (1945; 1969) 21. 'In the Indo-Germanic languages the root for this family is *sta*, to stand'. Out of it, 'there has developed this essential family, comprising such members as: consist, constancy, constitution, contrast, destiny, ecstasy, existence,

Margaret Kovach's *Indigenous Methodologies* (2009), which has these introductory fragments:

This book takes the form of three layers or dimensions: (a) situating self; (b) introduction, context (Chapters 1, 2, 9), and conclusion; and (c) the qualities of Indigenous inquiry (Chapters 3 to 8). The most outward dimensions (i.e., situating myself) are marked by a Prologue and Epilogue that contain a personal narrative of my research journey while I was conducting my doctoral work (the basis of this book). Sharing from my story is a conscious way to illustrate 'self-in-relation' I wish to show the holistic, personal journey, not solely its cognitive component, and how it resonated with all parts of my being. The Prologue and Epilogue give formal uninterrupted space for narrative, and while this form of sharing integrates itself throughout the text, it is intentional that the work begins and ends with story.³⁷

This is a research story. It is situated in a time, place, and context. The journey began in a landscape of ocean air and cedar trees, and travelled to a place where strong winds push sage brush across the dry plain. Although the narrative style is present, the writing often shape-shifts to other forms. Like sweet grass, it has three braids, comprising three writing styles: expository, analytical, and narrative. As a method for incorporating narrative, I periodically rely upon the first-person voice. It has the additional benefit of keeping me grounded. . . . Using the first person honours the experiential while engaging the abstract and theoretical. I have made this choice because given all my understandings of Nehiyaw and Saukteaux culture that have guided me through this journey, the one that keeps coming back is, 'Keep it whole, girl.' This is my way of trying to do that.³⁸

Kovach's 'holistic' approach will not get the approval of those who would insist on keeping matters of 'style' apart from matters of 'substance', those who imagine 'the personal' to be opposed to 'the academic', which is used as if capitalized (Academic).³⁹ Similarly, mixing 'the experiential' and 'the theoretical' in some 'academic' circles would be as objectionable as mixing whites and blacks was for the purists in South

hypostatize, obstacle, stage, state, status, statute, stead, subsist, and system.' Burke believes that 'one could build a whole philosophic universe by tracking down the ramifications of this one root.'

³⁷ M Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (2009) 15-16.

³⁸ Ibid 21-22.

³⁹ '[W]hen a word is properly defined it loses its capital letter and can no longer serve either as a banner or as a hostile slogan; it becomes simply a sign, helping us to grasp some concrete reality, or concrete

Africa during the apartheid regime. For Kovach, however, an academic life should be a way and means to becoming an integrated, 'whole' person. (Integration at the level of a person, she suggests, can serve as a model for communities.) So it is for White. And so it is for me.

* * *

This Thesis is not like some clearly drawn map of familiar territory; rather, it is a work of exploration, undertaken from various starting-points, the roads from which repeatedly overlap.⁴⁰ In a culture that commonly judges the worth of a project by its instantly demonstrable utility, a journey such as this one confronts a problem: it is not able to tell its readers here and now both the destination to which it heads *and* the roads that we take to get there.⁴¹ Ludwig Wittgenstein addressed this problem at the beginning of his *Lecture on Ethics* (1929):

[T]he hearer is incapable of seeing both the road he is led and the goal which it leads to. That is to say: he either thinks: 'I understand all he says, but what on earth is he driving at' or else he thinks 'I see what he's driving at, but how on earth is he going to get there'. All I can do is again ask you to be patient and hope that in the end you may see both the way and where it leads to.⁴²

White is no stranger to this problem. His 'hope' may or may not overlap with Wittgenstein's. Concerning each of his principal books, White may well hope that his reader gets lost so that she (or he) can find herself.⁴³

Throughout much of the Thesis, White will be given a significant place to speak. His speaking voice arguably is the best definition of the living voice that he repeatedly calls out for. In an essay published in the inaugural issue of the *Cardozo Studies in Law*

objective, or a method of activity.' S Weil, 'The Power of Words' (1937), in G A Panichas (ed), *The Simone Weil Reader* (1977) 268, 270.

⁴⁰ This imagery draws from B Jouvenal, *Sovereignty: An Inquiry into the Political Good* (1957) xiii.

⁴¹ Here I rephrase a sentence in L E Wolcher, *Law's Task: The Tragic Circle of Law, Justice and Human Suffering* (2008) 1.

⁴² Quoted in L E Wolcher, *ibid.*

⁴³ In *The Legal Imagination* White reproduces Robert Frost's poem 'Directive', which includes these lines: 'And if you're lost enough to find yourself' and 'if you'll let a guide direct you / Who only has at heart your getting lost'. After the poem, White asks: 'Is "Directive" an expression of what a legal education should involve? (Do you ever hear of a judge talk as if he is, or ever has been, "lost enough to find himself"? A Law student?)' (782).

& Literature (1989), Milner Ball made the following suggestive remarks relating to White's voice:

It did not take long after I started doing law to discover that what was apt for me was regarded as out of place or idiosyncratic by others. I am glad now to live in changing circumstances. . . . The difference for me began with James Boyd White's *The Legal Imagination*. . . . White's is not a volume about law and imagination or about Law and Literature. It is an expansive, literate book about law. White's simple, unstated claim, brazen at the time, was: this is the way I do and think about law, and it is law – law, not something else; law, not law and something else. And his argument lies in the performance. . . . With White's book there began a reconstitution of legal scholarship: who and what was publishable and where and what counted as a real law review article for tenure. *The Legal Imagination* . . . demonstrated, with deceptive ease and gentleness, that we could talk about law in a very different way than the one prevalent in the law schools.⁴⁴

Largely for the purpose of attending to White's performance, and in doing so identifying what is so very different about the way we could talk about law, this Thesis makes unusually heavy use of lengthy quotations.

⁴⁴ M Ball, 'Confessions' (1989) 1 *Cardozo Studies in Law & Literature* 185, 186.

Appendix to the Introduction: Composition

Let me offer more words concerning the alphabetical lexicon.¹ I experimented with this form whilst writing my economics doctorate, which drew heavily from John Commons' pioneering efforts to make a place for cultural evolution in economics. In that work, I intended the lexicon to serve as a way of communicating with economists who could not understand what Commons was driving at. Some introductory remarks on his work will help me talk about the present lexicon.

In 1886, Commons went to John Hopkins University, where he studied under Richard Ely, who was interested in the relation of law to economics. Commons flourished in Ely's custom of involving students in fieldwork projects, a custom that reflected Ely's efforts to integrate the theoretical and the practical. In 1904, Commons accepted a teaching job from Ely, who was then at the University of Wisconsin. Ely asked Commons to head some research, out of which came the ten-volume *Documentary History of American Industrial Society* (1910). Before the project had finished, Commons had become a principal advisor of the Wisconsin 'progressive movement' under Governor Robert La Follette. Commons helped draft legislation in the fields of industrial relations, civil service, public utility regulation and unemployment insurance. In drafting bills, he imagined what it would require for the courts to deem them 'constitutional'. This led to a central question, which is at the heart of his *Legal Foundations of Capitalism* (1924): 'What do the courts mean by reasonable value?'² Commons had read Thorstein Veblen's criticism of various economic schools suggesting that 'an evolutionary theory of value must be constructed out of the habits and customs of social life.'³ With that suggestion, Commons engaged with what he considered vital materials concerning social customs, namely, the decisions of the courts. With his students he began 'digging directly out of the court decisions stretching over several hundred years the behavioristic theory of value on which they were working.'⁴

¹ I am indebted to a friend for suggesting the value of more words on the lexicon and for some very helpful imagery for thinking about it.

² J R Commons, *Legal Foundations of Capitalism* (1924; 1995) xxxv.

³ Ibid.

⁴ Ibid.

This study involved connecting disciplines: ‘we tried to reconcile the economists from Quesnay to Cassel with the lawyers from Coke to Taft.’⁵ Eventually Commons and his students found that what they ‘were really working upon was not merely a theory of Reasonable Value but the Legal Foundations of Capitalism itself.’⁶ *Legal Foundations of Capitalism* offers an account of the politico-legal economic transformation from feudalism to capitalism. He outlines the genesis of the markets for land (the ‘rent bargain’) and commodities (the ‘price bargain’) and labour (the ‘wage bargain’). In doing so, he connected insights from various disciplines (especially law and economics) and these were adapted to an evolutionary theory resembling that of Darwin’s ‘artificial selection’, a term Commons uses. Commons gave considerable attention to the role of the state as a medium for channeling the direction of artificial selection. He had an image of the state akin to Darwin’s image of the breeder.⁷ Commons’ ‘custom’ is analogous to heredity.⁸

What Commons calls the ‘art of political economy’⁹ is not concerned with fine tuning Adam Smith’s ‘invisible hand’, but deliberately creating the institutional structure upon which the ‘hand’ operates, and in doing so determining the direction of artificial selection. For Commons, ‘the oversight’ of ‘Adam Smith and the classical economists’ is ‘explicable in the fact that what they mistook for the order of nature or divine providence was merely the common law silently growing up around them in the decisions of judges who were quietly selecting and standardizing the good customs of the neighborhood and rejecting the bad practices that did not conform to the accepted rules of reason.’¹⁰ Smith’s ‘hand’, Commons discerned, is not the hand of God, but the ‘visible hand’¹¹ of the lawmaker.

Commons discerned that the courts had furnished a unit of investigation that could transcend the problematic dualism of individual and social, namely, a ‘going concern’.¹² In *Law and Economics* (1925), Commons suggestively introduces this unit:

⁵ Ibid.

⁶ Ibid xxxv-vi.

⁷ I discuss this image and apply it to various events in New Zealand in my article ‘Artificial Selection in Colonial New Zealand’ (1999) 7 *Waikato Law Review* 73.

⁸ J R Commons, *Institutional Economics: Its Place in Political Economy* (1934) 638.

⁹ *Legal Foundations of Capitalism* 379.

¹⁰ Ibid 241-2.

¹¹ Ibid 204.

¹² Ibid 8 and 143-213.

[I]n order to do justice to the parties in view of the relations and obligations previously assumed, the courts have built up the . . . concept of . . . a 'going concern' which acts as a unit, though composed of individuals, and is endowed with many of the legal attributes attached to individuals. They have converted the economists' 'individual' into a set of relations, habits, transactions, or customs, of associated individuals. . . . [T]he true unit of economic theory is not an individual but a going concern composed of individuals in their many transactions of principal and agent, superior and inferior, employer and employee, seller and customer, creditor and debtor, bailor and bailee, patron and client, etc. Each individual in society, for the purposes of economic theory, comes to the surface as a member, a participant, a 'citizen,' in several of the going concerns, shifting from one to another and performing the work of certain jobs, or positions, or other set of transactions, in each particular concern for the time being, the supreme concern being the political one which attempts to monopolize the physical coercive power of society.¹³

Commons here offers to enrich the abstract, timeless and isolated *Homo economicus*. His move from the economists' 'individual' to a 'citizen', who has existing 'relations and obligations', brings in the topic of 'justice' before the economist. This integrative movement connects 'the economic', 'the legal', and 'the political'.

The use to which Commons puts the courts' 'going concern' has significant consequences for the language of economics, for the ordinary meanings of a number of key words change. These words include: coercion, cost, economy, equality, liberty, property, scarcity, and value. Commons connects each of these words and gives them new meanings, along with many other significant words in our culture. In doing so, he places great demands upon his reader, in part through the use of new words.

Great help in reading Commons has been given in Yngve Ramstad's *A Pragmatist's Quest for Holistic Knowledge: The Scientific Methodology of John R. Commons* (1986).¹⁴ For Ramstad, Commons' 'holism' involves thinking in terms of part-whole relations:

To truly understand the meaning in part-whole terms of any component of Commons' thought, one must first grasp his entire framework. How else can one grasp his part-whole relationships? This reality, however, complicates enormously the task of understanding Commons, for his 'whole' was exceptionally comprehensive. Through a lifetime of study,

¹³ J R Commons, 'Law and Economics' (1925) 34 *Yale Law Journal* 371, 375.

Commons had managed, by the time he completed *Institutional Economics* at seventy-two years of age, to acquire a truly staggering knowledge of intellectual history, legal history, and economic history . . . , all of which he synthesized into his conception of 'political economy' – and, moreover, which he felt compelled to communicate on part-whole terms. Given the ambitious task Commons set for himself, the comprehensiveness of the 'whole' he sought to delineate and the unfamiliar language he used to clarify its 'parts,' the reader of *Institutional Economics* is faced with a truly formidable challenge.¹⁵

We might say that Commons' reader will need to engage in a significant process of attunement, or tuning in.

Concerning any one of Commons' major works, a reader expecting a conventional linear format may well experience his writing as something of a ramble. However, as Ramstad suggests, his style may be experienced as methodical if one thinks of him as 'holistic'. What one Commons critic (who is also a White critic) imagines as 'a mass of descriptive material waiting for a theory'¹⁶ can be more fittingly imagined as a thoughtfully organized work of cultural and legal-economic criticism.

Each of Commons' major works offers an experience of gradual acculturation. Immediately following the passage quoted above, Ramstad offers the suggestive metaphor of reader as anthropologist:

In fact, that challenge is in many ways similar to the undertaking of an anthropologist who is set down in the midst of a primitive social group and instructed to discover the meaning of activities and objects as understood by the members of this alien culture themselves. Only slowly, as the participant-observer gradually becomes familiar with the activities of the new culture and the contextual nuances of the language in which its members express their thoughts, do accurate meanings, and thereby genuine understanding emerge. In like fashion, one simply cannot grasp what Commons is driving at on an initial reading. Indeed, even approximately to grasp fully his framework in part-whole terms, as Commons attempted to articulate it in *Institutional Economics*, it may be necessary first to read and re-read all of Commons' major works. In short, Commons is not a 'quick read'; one must

¹⁴ Y Ramstad, 'A Pragmatist's Quest for Holistic Knowledge: The Scientific Methodology of John R Commons' (1986) 20 *Journal of Economic Issues* 1067.

¹⁵ Ibid 1095-6.

¹⁶ R A Posner, 'The New Institutional Economics Meets Law and Economics' (1993) *Journal of Institutional and Theoretical Economics* 73, 75.

persist long enough to acquire a sense of the whole before the parts themselves can be understood.¹⁷

The anthropologist imagined here is not the old type who eventually turns subjects into objects. She (or he) will expect a transformation of the imagination, with not only the strange becoming familiar but also the familiar becoming strange. Like Burke, Commons returns repeatedly to some basic questions, but on each new occasion the material and the issues in them are come at from a different standpoint. This is the process by which he reinterprets familiar institutions – such as ‘exchange’, ‘the market’, and ‘government’ – in such a fashion that they take on a new meaning. The nature and significance of these institutions can then be understood more deeply, which includes being recognized as cultural and fluid, rather than natural and static, and as profoundly interdependent or interconnected. The new meanings are given shape and form with a new language, that is, a reformulation of the one he has inherited.

In my attempt to talk with people who were unfamiliar with Commons’ work, I put together a series of sections, each of which is devoted to one of his key words. Each section offered a sense of its place in his larger framework, a sense from a limited standpoint. Each section offered a mini-exploration, learning a little of Commons’ world, before beginning again from another standpoint.

I shelved the experiment with the lexicon for a variety of reasons. I now regret shelving it, for I have come to believe that it is the best way to read such an extensive work that centers on dynamics of cultural transformation. Any attempt to present these dynamics in a linear and propositional form would fail to do justice to the complexities and subtleties of such transformation.

My experience of reading White has strikingly resembled my experience of reading Commons. (White’s work on the activity of rereading helped to make sense of and constructively transform my experience of reading Commons.) Both White and Commons deal with an extraordinarily expansive ‘whole’, an evolving culture. Both writers require multiple rereadings if they are to be *really* read. And both have been profoundly misunderstood, no doubt partly due to the power of habits of thought in

¹⁷ Ramstad, *op cit*, 1096.

the culture that they criticize. The form of an alphabetical lexicon offers a collection of bases from which to engage with some of these habits.

One characteristic of the form is that it involves extensive quotation, for it is vital to attend to a whole way of thought and expression. As I suggest above, one cannot say of White that X or Y is his position on an issue, for he typically seeks to transform the language with which ‘we’ talk about positions. This process needs to be fully re-presented for the purpose of enabling ‘under-standing’.¹⁸ Likewise, the work of opposed or critical voices needs to be re-presented at length if the force and nature of their thinking is to be understood.

I hope that the form of this Thesis, and of the book that I intend to come from it, will become a model for similar expansive explorations. It could be used, for example, with respect to a philosopher like Simone Weil, an historian like John Pocock, a political theorist like Thomas Hobbes, or a distinguished jurist like the second Justice Harlan.

During the final stages of putting this Thesis together, I left out several entries, including one titled ‘Composition’. A fragment from it concludes this Introduction.

At secondary school, I was fascinated with economics. The ‘paradox of thrift’ particularly intrigued me. This paradox is often discussed under the topic of part-whole relationships, and it is concerned with reasoning that seems fallacious. The text I used, an old edition of Paul Samuelson’s *Economics*, says this about the paradox:

In economics, we must always be on guard against the logical fallacy of composition. What is good for each person separately need not always be good for all; under some circumstances, private prudence may be social folly. Specifically, this means that the attempt of each and every person to increase his saving may – under the conditions to be described – result in a reduction of actual saving by all the people in the community.¹⁹

The fallacy of composition can occur when someone asserts that what explains or is true of a part (or parts) of a whole necessarily explains or is true of the whole, and vice

¹⁸ It could be productive to connect White’s work to talk about ‘the middle voice’, which invites a reimagining of the activity of under-standing. See, for example, P Eberhard, *The Middle Voice in Gadamer’s Hermeneutics* (2004). For Eberhard, under-standing involves distinct processes, as suggested in his use of the hyphen.

versa.²⁰ A key point of the lesson was this: the whole ('macro') economy is not simply the sum of its ('micro') parts.

The paradox of thrift is one of many examples in economics of the fallacy of composition. John Maynard Keynes first presented the paradox of thrift to economists in his *The General Theory of Employment, Interest and Money* (1936), as a contribution to explaining and to ending the Great Depression. At the outset of his book, Keynes suggests that his approach to economics challenged a mode of thought:

The classical theorists resemble Euclidean geometers in a non-Euclidean world who, discovering that in experience straight lines apparently parallel often meet, rebuke the lines for not keeping straight – as the only remedy for the unfortunate collisions which are occurring. Yet, in truth, there is no remedy except to throw over the axiom of parallels and to work out a non-Euclidean geometry. Something similar is required today in economics.²¹

Keynes arguably goes on to adopt what has been called a 'Babylonian' mode of thought, which adopts the position that it is not possible in general to establish unproblematic axioms from which to mechanically derive solutions and that we should work with various strands of argument in the face of limited knowledge on contemporary problems.²² I say 'arguably' because there is much dispute as to what Keynes said and did. Related to this dispute, as an economics student at university, I became interested in the composition of the *General Theory*. At the end of the Preface to his book, Keynes invites such an interest:

The composition of this book has been for the author a long struggle of escape, and so must the reading of it be for most readers if the author's assault upon them is to be successful, – a struggle of escape from habitual modes of thought and expression. The ideas which are here expressed so laboriously are extremely simple and should be obvious. The difficulty lies, not in the new ideas, but in escaping from the old ones, which ramify, for those brought up as most of us have been, into every corner of our minds.²³

¹⁹ P Samuelson, *Economics* (1955; 1961) 272.

²⁰ I have abbreviated a line in W J Samuels, 'Part-Whole Relationships' in G M Hodgson, W J Samuels, and M R Tool (eds), *The Elgar Companion to Institutional and Evolutionary Economics* (1994) II, 142, 143.

²¹ J M Keynes, *The General Theory of Employment, Interest and Money* (1936; 1973) xxiii.

²² For a discussion of the term 'Babylonian' and its applicability to Keynes, see S C Dow, *Macroeconomic Thought: A Methodological Approach* (1985) 14-17.

²³ Keynes, *op cit*, xxiii.

Whilst writing this Thesis, those words have repeatedly come to mind. They speak well for me here.

Some economics textbooks today erase the fallacy of composition from existence, notwithstanding the inclusion of summaries of 'Keynesian economics'.²⁴ A prime reason for such an omission, for doing what I think is a grave injustice to Keynes, would seem to be to produce an 'integrated', systematic theory, one in which the whole is equal to the sum of the parts. The image of the economy that they seek to produce is that of an isolated, self-enclosed, self-equilibrating machine, the very image Keynes sought to resist. The mechanistic models and theories have a plethora of 'unrealistic assumptions', which, as discussed below (p.92), may be thought to be unproblematic if one compares the theories to maps. The popular map analogy, however, has long troubled me. In many situations, cartographers perhaps should be less troubled by the fallacy of composition than economists and other writers.

Speaking of maps and composition, the later Wittgenstein was distrustful of talking about the nature of 'language as a whole'. A common short reply of his to the question of what language 'is' is 'a collection' – a vast collection of words that can be used in the multifarious contexts of life in infinite ways. He did develop analogies for language, including that of an unplanned city, which has grown in an 'organic' way. In this city, different 'parts' are of different ages, differences that reflect the different activities that go on in them.²⁵ Philosophy is like language:

In teaching you philosophy I'm like a guide showing you how to find your way round London. I have to take you through the city from north to south, from east to west, from Euston to the embankment and from Piccadilly to the Marble Arch. After I have taken you on many journeys through the city, in all sorts of directions, we shall have passed through any given street a number of times – each time traversing the street as part of a different journey. At the end of this you will know London; you will be able to find your way about like a born Londoner. Of course, a good guide will take you through the more important

²⁴ See, for example, J Taylor and P Dalziel, *Macroeconomics – New Zealand Edition* (2002).

²⁵ My discussion here draws from G Kitching, *The Trouble with Theory: The Educational Costs of Postmodernism* (2008) 91-94.

streets more often than he takes you down side streets; a bad guide will do the opposite. In philosophy I'm a rather bad guide.²⁶

The 'side streets' with which Wittgenstein concerned himself were detailed examples of acts with language. The nature and significance of these were such that they direct attention to a fallacy of composition: the whole is not simply the sum of the parts. We cannot make a map of 'language as a whole' in the way a mapmaker of London can give us a map of London as a whole.

Wittgenstein's guide analogy can be given new life here. As a friend suggested to me, if we think of the work of another person (White, Commons, Wittgenstein, . . .) as a terrain (let us say a city), a linear mode of analysis may drive its way across it, but much as a motorway would. In the pages that follow, we will be making a series of interdependent entries into White's work, from different standpoints. This should give a much richer and fuller account of the nature and quality of the 'city', of its parts and their relations. Part of this account prods attention to what has been, and what might have been, left out on the journey. Having recently omitted several significant entries (including 'Conversation' and 'Translation'²⁷) in order to make the length of this Thesis manageable, I am particularly conscious of important gaps.

²⁶ D A T Gasking and A C Jackson, 'Wittgenstein as a Teacher' in K T Fann (ed), *Ludwig Wittgenstein: The Man and His Philosophy* (1967) 49, 51.

²⁷ I have included a brief discussion of White's work on the activity of translation in my 'Waitangi, Translation, and Metaphor' (2005) 2 (New Series) *Sites: A Journal of Social Anthropology* 33.

Activity

Each of White's principal books, to recall, directs attention to 'a particular activity of mind and language.' For example, in *The Legal Imagination* 'it is the activity of learning to speak and think like a lawyer'. In *When Words Lose Their Meaning*, 'it is the compositional activity in which we engage when we work with the language of our culture'. Our *activity* of 'tuning in' to White's work calls for our attention to be directed on the word 'activity'.

* * *

In one of the *Michigan Law Review* (2007) contributions marking White's retirement, Lee Bollinger claimed that White's work offers a challenge to academics who talk about being 'interdisciplinary':

I remember vividly when . . . *The Legal Imagination* appeared and was followed by *When Words Lose Their Meaning*. They were remarkable achievements. In the prior decade of the 1960s, the view that law could benefit by integrating the knowledge and perspectives of other fields had gained a solid hold, especially within the legal academy. Economics, psychology, sociology, political science, anthropology, and several other disciplines were quickly joined with legal study, and with enormous consequences, mostly beneficial. But Jim's early books transcended disciplines altogether and singularly opened up a way of approaching any text, whether a poem or a judicial opinion.¹

Bollinger here suggests that White's 'way' of reading should be imagined as a contribution not to *interdisciplinary* work but to *transdisciplinary* work. How might such work be imagined?

In both *The Legal Imagination* and *When Words Lose Their Meaning* White acknowledges several teachers, including Reuben Brower. Brower contributed to the development of Amherst College's famous freshman composition course English 1-2

(*Questioning), along with a course in literary criticism for sophomores. The sophomore course was in a sense a course in close, or as he termed it, 'slow' reading.² Brower's approach to reading is outlined in *The Fields of Light* (1951), which was published at a time when statements about the end product of reading (usually in terms of 'meaning' or 'understanding') commonly left out the reader.³ Brower sought to draw attention to that which can be readily forgotten, namely that reading is an *activity*, which a reader *does*. He says in the opening section, titled 'To the Reader':

This is a book to read with, an experiment in critical reading. While writing it, I have always been thinking of literature as *read* by someone, as an active engagement between the reader and the printed page. My aim has been twofold: to demonstrate some methods of reading analysis and to use them in discovering designs of imaginative organization in particular poems, plays, and novels. A book of this sort necessarily calls for active participation if the experiment is to be even moderately successful. The ideal reader of the chapters that follow will stop to read a poem more than once, or come back to a chapter a second time after he has reread the novel or play that is being discussed. He will on occasion want to read a poem or a passage of prose aloud. Above all he will not forget that he is making an experiment, that he is learning to do something, rather than passively viewing a series of more or less revolutionary interpretations on which he is to vote 'Yes' or 'No.' I shall not measure the success of this book by whether the reader agrees or disagrees with my interpretations, but by the way in which he interprets the next poem or the next novel he reads. If by adopting some of the methods I have used he discovers relations he had missed before, then he may agree with me that the experiment has been successful.⁴

The activity of reading, for Brower, is not a 'passive[] viewing' from a distance but an 'active engagement'. His reader might wonder what 'relations' could have been 'missed before'. (These 'relations' may include nothing less than the constitution of a community, a textual community – including an 'ideal reader' – that could serve as a touchstone for judging other communities.) Was she not paying attention?

¹ L C Bollinger, 'The Imagination of James Boyd White' (2007) 105 *Michigan Law Review* 1387, 1387.

² These details on Brower are drawn from R Varnum, *Fencing with Words: A History of Writing Instruction at Amherst College during the Era of Theodore Baird, 1938-1966* (1996) 70.

³ Stanley Fish makes this point in his *Self-Consuming Artifacts: The Experience of Seventeenth-Century Literature* (1972) 383.

⁴ R A Brower, *The Fields of Light: An Experiment in Critical Reading* (1951; 1962) xi-xii.

At about the time *Fields of Light* was published, several philosophers of consciousness, including Michael Polanyi and Bernard Lonergan, were directing attention to our inability as humans to render all our knowledge explicit.⁵ Brower touches on this matter in some remarks about ‘method’:

In spite of the ugly associations attached to such terms as method and analysis the responsible critic is obliged to give an account of what he is doing, of how he works. He will not succeed, of course, since no one, including the technologist, ever describes exactly what he does. However conscious the operator may be, there is always some point at which he becomes inarticulate; some indispensable act of perception, of co-ordination of eye and hand, lies beyond expression. The brief and generalized account of method in the first chapter of this book certainly does not escape the limitations common to all similar accounts. But the ideal reader (perhaps he is beginning to seem impossibly ideal) will take it as a rough chart and move on as quickly as possible to what is done. Others may wish to omit it until the last; still others may omit it altogether.

... [T]he seasoned reader ... will realize that I most certainly do not recommend reading every book with the same closeness of attention. ... But there is a therapeutic value in occasional experiments in slow reading. For in reading, as in other arts, there is a mental form and awareness to be fostered and improved by directed practice. Most of us are not in danger of reading too closely or with too fine a response too much of the time.⁶

Given that we do not all read ‘with the same closeness of attention’, how might we read that fragment? Is some ‘slow reading’ called for in order to ‘read’ it well? Who might be Brower’s ‘ideal reader’ for the purpose of reading his opening section?

Brower’s ideal reader may well come back to the opening section after reading the first chapter and attend to ‘the speaking voice’ (this is the title of Brower’s opening chapter). Attention to voice includes attention to ‘tone’: ‘By tone I refer to: (1) the implied social relationship of the speaker to his auditor and (2) the manner he adopts in addressing his auditor.’⁷ What, we might ask, is Brower’s manner? Does he impel his reader to speak like a student? Or does he speak as an independent mind to an independent mind, and thereby constitute an egalitarian community (*Equality)?

⁵ E Webb, *Philosophers of Consciousness: Polanyi, Lonergan, Voegelin, Ricoeur, Girard, Kierkegaard* (1988).

⁶ Brower, *op cit*, xi-xii.

A Brower reader will hear an echo of Brower in White's work. White's adoption of Brower's 'methods' do not stop with poems and novels. There may be no limit or boundary here – even 'Chicago'-style 'economics of' works. White's *When Words Lose Their Meaning* develops, more fully than in *The Legal Imagination*, what he calls 'a way of reading' (the title of his opening chapter), which he defines as a form of writing (or 'composing'): 'The activity of reading in which we shall . . . engage is . . . a kind of writing; for the process is completed only in the organization and expression of our responses to what we have read.'⁸ For White, the image of the reader as writer/composer is more fitting than a common one: 'Writing is never merely the transfer of information, whether factual or conceptual, from one mind to another, as much of our talk about it assumes, but is always a way of acting both upon the language, which the writer perpetually reconstitutes in his use of it, and upon the reader.'⁹ White, we might say, rejects 'transfer' in favour of transformation.

Following Brower's *Field's of Light*, a principal concern of *When Words Lose Their Meaning* is with ways of making judgments about texts. White's talk about such judgments is developed out of the construct of an 'ideal reader', which he introduces with these words:

[A] writer always gives himself a character in what he writes; it shows in the tone of voice he adopts, in the signals he gives the reader as to how to take that tone of voice, in the attitudes he invites his reader to have toward the world or toward people or ideas within it, in the straightforwardness or trickiness with which he addresses his reader—his honesty or falseness—and in the way he treats the materials of his language and culture. The reader is also a character in the world created by the text. For in acting on the reader as he does, the writer calls on his to function out of what he knows and is—for one who brings nothing to a text cannot be a reader of it—and to realize some of his possibilities for perception and response, for making judgments and taking positions. To engage with a text is to become different from what one was. There is a sense in which every text may be said to define an ideal reader, which it asks its audience to become, or to approximate, for the moment at least and perhaps forever.¹⁰

⁷ Ibid 22.

⁸ *When Words Lose Their Meaning* 5.

⁹ Ibid 6.

‘Reading’, for White, is thus an ethical activity, a way of becoming someone in relation to another. Who, one might ask, is White’s ‘ideal reader’? Is she or he perhaps someone you want to become? How will ‘you’ know? What language might be fitting for working out judgments for that question?

What are the questions at the core of White’s approach to reading (*Questioning)? White tells us this at the outset:

The basic question we shall ask of the texts we read, and of the particular performances within them, will thus be: What kind of action with words is this? This question will be elaborated by being broken down into two others: What kind of relationship does this writer establish with his language? and What kind of relationship does he establish with his audience or reader? To put this in other words: What kind of cultural action is this writing? and What kind of social action is it?¹¹

In the spirit of reflexivity that White invites, what kind of cultural action is his writing? What kind of social action is it?

The texts read are: Homer’s *Iliad*, Thucydides’ *History of the Peloponnesian War*, Plato’s *Gorgias*, Jonathan Swift’s *A Tale of a Tub*, Samuel Johnson’s *Rambler* essays, Jane Austen’s *Emma*, Edmund Burke’s *Reflections on the French Revolution*, and some American constitutional materials, namely the Declaration of Independence, the Constitution of the United States, and Chief Justice Marshall’s opinion in *McCulloch v Maryland*. Each chapter (after the opening introductory chapter) in White’s book is devoted to one of the texts (the American materials are read together). Concerning the selections of texts: ‘One of my reasons for choosing a wide diversity of texts is to show that this way of reading can work to unite matters that are often thought to be apart.’¹² White’s efforts to ‘unite’ various genres can serve to dissolve boundaries that are commonly imagined to separate disciplines.

The genesis of White’s approach to reading is of present interest. He provides some background details about his ‘way of reading’ at the end of his book, details that are helpful for readers who seek to place his work among other approaches to the activity of reading. Here is a fragment:

¹⁰ Ibid 15.

¹¹ Ibid.

For me the beginning of reading is close attention to what actually happens in the language of the text itself, and my way of paying attention derives in part from the 'New Criticism' in which I was trained. . . . The achievement of the critical movement that is thought to have begun with Eliot was to draw attention to the complexity and richness of the experience that a text offered its reader and to locate its central meaning there: in the process of reading it made possible and in the education, in reading and life, that it offered.

To refer to my own experience, a great teacher like Reuben Brower would say that his aim was to read with his students in 'slow motion,' to unpack in detail and hence bring to understanding the process of reading itself. (. . . [S]ee Reuben Arthur Brower, *The Fields of Light: An Experiment in Critical Reading* [. . . 1951] . . .) Of course one cannot understand the experience of a text unless one understands the language (and that includes the cultural situation) of its author. It is significant in this connections that Brower's most important book was *Alexander Pope: The Poetry of Allusion* (. . . 1959), which was a study of the relations that this poet established with the classical world and with his own immediate culture.

To focus on the experience of reading necessarily involves the critic in a struggle of expression of understanding, for how is that experience to be spoken of? One's attempt is always imperfect because all attempts to reduce experience to language are imperfect. The best reading thus includes a retelling, one reader's version, which can be checked by other readers against their own. This was a commonplace of the 'New Criticism,' and I see that it is also presented as a discovery of poststructuralist hermeneutics today Such a method calls the reader's attention constantly to the relations between the writer and his language and between the reader and *his* language—relations it is my object in this book to examine in considerable detail.

Another assumption of 'New Criticism' and of criticism much earlier than that, going back . . . to . . . Aristotle, is that the activity of reading ought to be part of a larger activity of self-education; that the reader, whoever he or she may be, has something important to learn from a writer like Homer or Thucydides; and that the object of this process of education is not merely cognition—the acquisition of information and ideas—but a true education of one's sensibility and character. It will make the reader more nearly what he or she ought to be. This view, despised as it is by some, is my own, and this book, which is at its heart a report of my own search for such an education, is directed to a reader similarly engaged.

Even while talking about it I have continued to put 'New Criticism' in quotation marks, for I have great doubts about the value of talking about schools or theories of criticism in

¹² Ibid.

objectifying terms. Much of what is wrong about modern critical discourse seems to me its assumption, probably borrowed from social science, that one's basic positions can be stated, in a single sentence or two, as a set of propositions that one supports, which can then be subjected to argument in defense and attack.¹³

White's 'way of reading' will be done an injustice if we seek to reduce it to some closed system or ideological movement. Such a system or movement, which could readily be given a label that carries the suffix 'ism', would not give the elusive phenomenon of human 'attention' its due place (*Attention). (Movements that think and act in terms of an 'ism' commonly become so involved in reaction against other 'isms' that they are unwittingly controlled by them.¹⁴)

White's effort to 'bring to understanding the process of reading itself' can be thought of as part of a larger effort to understand the activity of understanding. This larger effort is addressed in Bernard Lonergan's *Insight* (1957), a central thesis of which is this: 'Thoroughly understand what it is to understand, and not only will you understand the broad lines of all there is to be understood but also you will possess a fixed base, an invariant pattern, opening upon all further developments of understanding.'¹⁵ *Insight* pursues this thesis *with* a reader who is engaged in the process of self-understanding. Lonergan adopts what has been called 'a first person inquiry approach',¹⁶ which he calls 'self-appropriation', a term that refers to the way in which '[o]ne consciously possesses one's dynamic self to the extent that such a conscious self-possession transforms one's very life'.¹⁷ To a reader who asks, 'What then is Lonergan getting at?',¹⁸ this reply seems fitting: 'Lonergan is getting at you and me'.¹⁹ He is inviting us to attend to our experience of experiencing the world. The

¹³ Ibid 287-88.

¹⁴ Here I echo J Dewey, *Experience and Education* (1938; 1955) vii. What is called 'White's 'transformative constitutionalism' in this Thesis may be best left in quotation marks, for that may help us resist imagining a world of fixed objects, which has little place for a transformative constitutionalism worthy of the name. Scare quotes might productively remind us to slow down our reading. We can take it that learning to read in 'slow motion' can help us to attend to 'constitutions and reconstitutions of language, character, and community' (White's subtitle), which is the fluid material of what I am calling 'transformative constitutionalism', that we might otherwise miss.

¹⁵ B J F Lonergan, *Insight: A Study of Human Understanding* (1957; 1973) xxviii.

¹⁶ D Coughlan, 'Authenticity as first person practice: An exploration based on Bernard Lonergan (2008) 6 *Action Research* 351.

¹⁷ T Naickamparambil, *Through Self-Discovery to Self-Transcendence: A Study of Cognitive Self-Appropriation in B. Lonergan* (1997) 45.

¹⁸ P McShane, *Introducing the thought of Bernard Lonergan* (1968) 7.

¹⁹ Ibid.

invitation itself may be quite an experience, especially if it is one's first. The experience might be imagined as the beginning of what White calls 'an education'.

The title of White's book draws from a passage in Thucydides' *History* in which Thucydides describes the disintegration of the Hellenic world under the pressures of war and revolution. White's opening chapter, 'A Way of Reading', begins as follows:

When Thucydides wishes to express his sense of the internal chaos brought upon the cities of Greece by the civil wars that arose during the time of the Peloponnesian War, he tells us, among other things, that words themselves lost their meaning. The Greek terms for bravery and cowardice and trust and loyalty and manliness and weakness and moderation, the key terms of value in that world, changed their accepted significance and their role in thought and life. What before would have been called something like idiotic recklessness, for example, was now called stouthearted loyalty to friends; what would have been praised as prudent foresight was now condemned as cowardice. Whether or not Thucydides' report is accurate, he speaks of changes that undoubtedly do occur, though usually more slowly, for others have spoken in similar terms about great changes in language and in life. Clarendon and Burke do so, for example, in lamenting the political transformations of their respective times, and so too does Proust when, at the end of his life, he finds uprooted every understanding on which he has founded his social expectations and his sense of himself. Such changes in language may, of course, be felt not as deteriorations but as great advances. The Declaration of Independence, for example, claims to create a new world when it declares its new and self-evident truths; and Thoreau, in a different way, also claims to create a new life and a new language when he goes to live by the pond in the woods.²⁰

When Words Lose Their Meaning is about 'great changes in language and in life'. White's book also offers to create such changes. By the time White's reader has finished reading the book, what before would have been called 'reading' is no longer the same *activity*. A word has lost its meaning. This and other changes in language may be felt as a deterioration or as an advance. How are we to carry out the *activity* of judging White's acts with words?

After offering some more details about the world Thucydides describes, White goes on to make a connection between Thucydides' *History* and his own book:

²⁰ *When Words Lose Their Meaning* 3.

An alteration in language of the kind I mean is not merely a lexical event, and it is not reversible by insistence upon a set of proper definitions. It is a change in the world and the self, in manners and conduct and sentiment. Changes of this kind are complex and reciprocal in nature. The change in language that Thucydides records, for example, is in part caused by events of another kind, which are only partly verbal – those of the civil war; but the changes in language in turn contribute to the course and nature of that war and do much to define its meaning. The process is reciprocal in another sense as well, for at every stage the change is effected, knowingly or not, by the action of individual people who at once form and are formed by their language and the events of their world. When language changes meaning, the world changes meaning, and we are part of the world.

One response to the world is to make a text about it, a reorganization of its resources of meaning tentatively achieved in a relation, newly constituted, between reader and writer. This is a way of acting in the world and on the world by using the language of the world. Thucydides' *History* is a response of this kind; so are the other texts we shall examine, and so indeed, is this book itself. Other activities are also texts in this sense, including the conversations that take place among us, at home or at the office or on the street, whenever we talk about what matters to us. We struggle to make our words work as we wish, to redefine them to meet our needs, and in doing this we remake, in ways however small, our language and our world. The reconstitution of culture in a relation shared between speaker and audience is in fact a universal human activity, engaged in by every speaker in every culture, literate or illiterate, and the texts we shall read in this book can be taken as extraordinary powerful and instructive examples of this activity. While this book is in some sense about reading, then, it is also about 'writing' in the most general sense of the term: about what happens whenever a person uses language to claim a meaning for experience, to act on the world, or to establish relations with another person.²¹

This passage 'matters to us', to say the least. Here we have a significant resource for giving content to that which we are calling, with a 'struggle', 'transformative constitutionalism'. It seems difficult to imagine a world further away from the modern orthodox economist's world of 'general equilibrium', in which there is no time and no motion. White's premodern (as opposed to 'postmodern') world is one of general disequilibrium, with every part in flux. The central activity here, to reiterate, is the 'reconstitution' of 'language', 'self', and 'culture'. In his own particular efforts here in '[t]he reconstitution of culture', White provides a glimpse of his interest in seeking 'to

unite matters that are often thought to be apart', for all '[o]ther activities' become classes of 'a universal human activity', namely, 'the reconstitution of culture in a shared relation between speaker and audience'.

The kind of 'reading' White is concerned with is 'reading of a reconstructive and participatory kind, an active engagement with the materials of the text in order to learn about the real or imagined world of which they are a part.'²² White turns to the law school to offer a sense of what he means:

This is rather like the way in which law students learn to read cases as a way of learning about the world in which they will have to live . . . On his first day in school, the law student is given a case, or set of cases, just as they appear in the reports, without further guidance, and is asked to reconstruct them from the beginning. His job is to live over in his imagination the experience of the parties and of the lawyers, asking why this choice or that one was made, what he would have done, and how he would have explained himself. He is given a piece of the world in which he will one day have to make his way, and his task is to figure out what that world is like and how to function within it, all on the basis of extremely fragmentary evidence. His primary way of giving attention to a case is by arguing it in his head, by examining the resources for making appeals and claims on each side that constitute what we call the law. He or she tests each statement against other possibilities, wondering why it was not done this way or that, asking how things would go if the facts were changed in such-and-such particular, suggesting a puzzle that will crack open a particular line of reasoning, proposing an innovation, imagining a way to put a point to jury or judge, and so on. 'What would I do in this case?' is his constant question, and it is a complex one for it is a way of asking simultaneously about many things: about the nature of the resources he is offered by his world; about the way he and others can put them to use; about the facts of a particular case; and about his capacity to imagine or to invent new ways of talking that will work in the world he lives in. When he has done, he has mastered the set of persuasive resources that his culture makes available for dealing with a particular situation, and in doing that he has defined their limits. Together, the arguments made on each side establish in the world an idealized conversation in which the resources of the legal culture for claiming meaning and arousing sentiment are at once defined and exhausted and, in this way, exposed to analysis and criticism. It is as though the sea froze for a moment and we

²¹ Ibid 4.

²² Ibid 9.

could study the waves; when the argument is done, the waves roll on until the next time someone tries to claim an order for the materials of his or her world.²³

It may be fair to say that White's primary way of reimagining law is by suggesting that it has a legitimate place in cultural studies. For White, we can be sure, the case method of instruction in law is not a preliminary to an abstract or theoretical 'study' of rules or principles but part of an art of composition, an activity that moves from the 'fragmentary' to a larger whole (nothing less than an entire 'culture') and back again. This method cannot be reduced to mechanical deduction and induction; it is a disciplined use of the 'imagination'. Here 'possibilities' matter. These flow from one's questions: the activity of 'wondering why it was not done this way or that, asking how things would go if the facts were changed in such-and-such particular . . .' These questions are at the core of an image of movement, or *activity*.

Let us jump ahead to some concluding remarks in the final chapter of *When Words Lose Their Meaning*. Giving further attention to 'attention', White re-emphasizes the 'activity' that is at the heart of the book:

In this book I have sought to draw the reader's attention, and my own, to certain aspects of our common life and to hold it there. My object has been to make more fully accessible to thought the ways in which we constitute ourselves and our relations with other people when we use, and in using recreate, the language that makes us what we are. . . .

The texts read here have been drawn from a wide diversity of generic types: poetry, history, philosophy, fiction, and law and the less easily classifiable texts by Swift, Johnson, and Burke. But we have read each of these texts in much the same way, pursuing the same questions, drawing the same analogies and connections between texts, and so on. This has in part been a way of defining our subject not as poetry or philosophy or law or any of the others but as the general activity of which each of these is a species, namely, the cultural and ethical activity of making meaning in relation to others. By moving from one form to another I have tried to suggest that they can be all seen as one thing, not many, and to suggest a common way in which they can be read, understood, and learned from. . . .

The way of reading exemplified here is not an analytic technique that objectifies what it studies, nor is it a new conceptual system; rather, it is a way of responding to and thinking about the expressions of another mind. It has certain similarities with other ways of

²³ Ibid 9-10 (footnote omitted).

reading—with the attention to detail that characterizes the New Criticism, the respect paid to the text that is the hallmark of classical studies, and the reconstructive and participatory method of the law—but as a whole I believe it is different from any of them. It has been my purpose to record not merely a method or a set of terms but an activity of mind expressed in what I call a language. Such a language can be learned only by immersion in its processes. One understands it not when one can translate its terms into other equivalences but when one can do it oneself—when, in Wittgenstein’s phrase, one knows how to go on—as I hope the reader has begun to do with the language at work in this text. The key words of analysis and criticism that I have been using accordingly acquire their meaning not from explicit definition but from the reader’s experience of their use. While the book is not scientific in the usual sense, there is thus a sense in which it is nonetheless empirical, for its rests wholly on the reader’s verification of its value in his or her own experience. It is an invitation to an activity that must prove itself in the reader’s own terms.²⁴

How should we go about ‘responding to and thinking about the expressions of [White’s] mind’ here? White’s reader will fail to do justice to his ‘way of reading’ if she fails to attend to her or his own experience of using White’s ‘key words’. Speaking of such ‘experience’, White suggests that for certain purposes the line between ‘science’ and ‘art’ can be dissolved. His claim about his book being ‘scientific’ in a ‘sense’ other than ‘usual’ brings to mind a claim for using the word ‘science’ as a verb: ‘one *sciences*, i.e., deals with experience according to certain assumptions and with certain techniques.’²⁵ The use of the S-word as a noun can lead to trouble to the extent that it commits us to imagining ‘a vast terrain divided into a number of “fields” each tilled by its own appropriately named guild’.²⁶ This imagining can lead to problematic questions such as this: Is economics a science? Economists can science, we might say, if they reflectively deal with ‘experience’, including their own acts with language. The use of the word ‘science’ as a verb may remind us that economics, like law and cultural studies and . . . , is an *activity* of mind and imagination.

Some comments on Wittgenstein’s phrase concerning the activity of learning ‘to go on’ may be helpful. The phrase has a vitally important place in *The Legal Imagination*. In a section ‘Making a Language of Judicial Criticism’, White talks about ‘a famous

²⁴ Ibid 275-76.

²⁵ L A White, ‘Science is *Sciencing*’ (1938) 5 *Philosophy of Science* 369, 369.

²⁶ Ibid 371.

metaphor', namely Plato's Cave. In doing so, he expresses his dissatisfaction with talk about the mind. After a passage from the *Republic* that 'describes the mind at it best, and explains what its education involves',²⁷ White offers these remarks and questions:

One of the subjects of this passage is education, the process by which one goes from a state of darkness and ignorance to one of understanding and light, and of course Plato speaks of that metaphorically too: the critical event is a 'turning of the soul in the right direction,' or a 'conversion.' And our own language of education is also metaphorical: 'educate' comes from a Latin word meaning to 'lead out', for example. And one often hears about education as a process of acquiring knowledge or skills, as if the mind came to possess something it did not possess before: a knowledge of Latin, or an understanding of the principles of electricity or of the concepts of grammar or democracy. To learn is to grasp, to get; to know is to possess; to teach is to transfer, so that 'I teach them law' is a direct parallel to 'I serve them soup.' Can you think of any more intelligent ways to talk about learning and education? Are they metaphorical too?

Wittgenstein does propose a different version: sometimes, at least, it makes sense to explain understanding by saying that one who understands a proposition 'knows how to go on' from that point, that he knows what to say or do next. (*Philosophical Investigations* §§143-151 (1958).) How is the mind defined here? As a player in a game?

Which of these ways of describing knowledge (as a possession or as a game) would be more helpful to you if you tries to express what you have learned in law school? Or can you think of some third and better way?²⁸

Wittgenstein stressed that the speaking of language is part of an *activity*. To participate in this activity requires more than simply memorizing words and learning what in the world they stand for. When we learn a language, he suggests, we learn what to *do* with words, we learn to participate in communal life.²⁹ Concerning the

²⁷ *The Legal Imagination* 689.

²⁸ *Ibid* 694.

²⁹ Earlier in *The Legal Imagination* (at 183-84) White reproduces this famous passage from § 23 of Wittgenstein's *Philosophical Investigations*:

But how many kinds of sentence are there? Say assertion, question, and command? – There are *countless* different kinds of use of what we call 'symbols,' 'words,' 'sentences.' And this multiplicity is not something fixed, given once for all; but new types of language, new language-games, as we may say, come into existence, and others become obsolete and get forgotten. . . .

Here the term 'language-game' is meant to bring into prominence the fact that the *speaking* of language is part of an activity, or of a form of life.

Review the multiplicity of language-games in the following examples, and in others:

Giving orders, and obeying them –

understanding of mathematical formulae, Wittgenstein suggests that we ‘try not to think of understanding as a “mental process” at all. — For *that* is the expression which confuses you. But ask yourself: in what sort of case, in what kind of circumstances, do we say, “Now I know how to go on”’.³⁰ Wittgenstein here is not concerned with our ‘understanding’ in the sense of repeating some ‘idea’ but with being able to ‘go on’ in an activity. This sense of is readily applicable to ‘what you have learned in law school’: one learns to read a case not merely to extract a rule but to competently handle the ‘case arising’.

This sense of being able to ‘go on’ is significant for making sense of White’s ‘way of reading’ in *When Words Lose Their Meaning*:

Reading is simply not reducible to propositions of a simple theoretical kind, nor is argument of a theoretical sort very useful to us as readers. Reading is an activity of the whole mind, and I most usefully understand your conception of reading when I know how you read, not just conceptually — so that I can repeat what you say about reading — but practically, in the sense that I have got the hang of what you do and can do my own version of it myself. Such is the conception of reading on which this book is built.³¹

The *activity* of ‘tuning in’ to White’s ‘transformative constitutionalism’ may in part be taken as an attempt to get ‘the hang’ of what he does and to do one’s own version of it oneself. If we succeed in getting the hang we may be equipped to do justice to his work, which at its heart is concerned with doing justice (*Justice).

* * *

Describing the appearance of an object, or giving its measurements –
Constructing an object from a description (a drawing) –
Reporting an event –

...

Translating from one language into another –
Asking, thanking, cursing, greeting, praying.

– It is interesting to compare the multiplicity of the tools in language and of the ways they are used, the multiplicity of kinds of word and sentence, with what logicians have said about the structure of language.

In all those ways, and in other ways, we use language. It can be unhelpful and indeed dangerous to imagine that language is everywhere all alike. Wittgenstein has much to say on the dangers of such imagining. His conception of philosophy was to investigate the many ways language is used with the aim of liberating us from misunderstandings of how language functions, misunderstandings arising from problematic figures of thought and speech that we live by.

³⁰ L Wittgenstein, *Philosophical Investigations* (1953) §154.

³¹ *When Words Lose Their Meaning* 288.

In 1976, Thomas Eisele published a review of *The Legal Imagination*, identifying many basic connections between White's book and Wittgenstein's work. Here is one such connection:

The study of language is, for White, the study of the *uses* of . . . language and its constituent words; indeed, it is the lawyer's (and judge's and legislator's) *use* of words that in part constitutes the language of the law. In this I find a strong affinity between White's approach and Wittgenstein's emphasis. Wittgenstein's stress . . . is on language as speech, as something human beings do, as a form of action. Thus, language is seen as human activity rather than as a collection of labels for categories of phenomena.³²

We will do well to know that for Wittgenstein 'the goal of philosophy is Justice'.³³ He was principally concerned with challenging 'essentialist and reductionist forms of explanation'.³⁴ A person who commonly acts as if language is merely a collection of labels for categories of phenomena will be relatively insensitive to what is 'left out' and to the hierarchical community that he constitutes through his language. Here resides the beginning of injustice.

In 1984, Eisele completed a doctoral dissertation on Wittgenstein's work at the University of Michigan. White was a member of his dissertation committee. In *The Activity of Being a Lawyer* (1987),³⁵ Eisele makes further connections between White and Wittgenstein. After reading Eisele, one may be inclined to say that the activity of tuning in to Wittgenstein's language/activity-centered philosophy will surely be of great value for tuning in to White's language/activity-centered transformative constitutionalism. For a reader who is unfamiliar with Wittgenstein's work, a helpful place to begin an engagement with it is this fragment from Wolfgang Huemer's introductory remarks to the volume *The Literary Wittgenstein* (2004):

³² T D Eisele, 'The Legal Imagination and Language: A Philosophical Criticism' (1976) 47 *University of Colorado Law Review* 363, 366 (quotation marks omitted).

³³ Quoted in F McCutcheon, *Religion Within the Limits of Language Alone: Wittgenstein on Philosophy and Religion* (2001) 29.

³⁴ *Ibid.*

³⁵ T D Eisele, 'The Activity of Being a Lawyer: The Imaginative Pursuit of Implications and Possibilities' (1987) 54 *Tennessee Law Review* 345.

The philosophy of Ludwig Wittgenstein is characterized by an extraordinary interest in language, with remarkable results. Wittgenstein developed a picture of language that radically broke with the tradition and revolutionized the way philosophers approached the topic in the twentieth century. Whilst in his first book, the *Tractatus*, Wittgenstein focused on the question of how words can depict the world, he later came to understand language not as an abstract system, but as a social practice. He counteracted a longstanding tendency among philosophers to reduce language to assertive statements and to focus exclusively on analyzing their logical form with the goal of creating an 'ideal language.' Wittgenstein's crucial move was to point out that understanding language requires us to focus on how it is used by members of the linguistic community, appreciating all the nuances and varieties of expression that characterize everyday communication. . . .

For Wittgenstein language was not only one of the central problems of philosophy; it was also the key to their solution. Over and over he warned against our urge to misunderstand the workings of our language, pointing out the traps that are built into language and its powers to lead our philosophical paths into dark alleys, to 'bewitch our minds.' Wittgenstein argued that to solve philosophical problems we do not need better philosophical theories; we should not aim for *explanation*, but rather for a detailed *description* of the use of our words, providing a 'perspicuous representation' by means of which we can gain a more profound understanding of language. . . .

. . . [T]he importance of language for Wittgenstein is reflected not only by what he said, but also by how he said it: it has often been pointed out that the fascination of Wittgenstein's works lies to a considerable degree in their literary quality; like few other philosophers he succeeded in creating a harmony between the literary form and the philosophical content of his texts. . . . The literary style is of central importance not only in Wittgenstein's first book, but also in his later writings, especially in the *Philosophical Investigations*. . . . Wittgenstein did not adopt the stylistic conventions for philosophical texts at the time, but rather developed a new form of exposition – short remarks that are loosely connected to one another – which he thought more appropriate to express his ideas and in general to convey philosophical information. . . .

. . . Wittgenstein's later philosophy of language is characterized by a move from reference to use; 'the meaning of a word,' he famously states, 'is its use in the language'. By approaching language as a social practice, Wittgenstein does not put an emphasis on the relation between words and world; but rather focuses on detailed investigations of how words are used in diverse contexts of human practice. Moreover, he refuses the tendency prevalent in the referential picture to reduce all legitimate uses of language to assertive

statements, or, more generally, to bearers of truth-value, but recognizes that language can be used in many different ways to pursue a variety of different goals. . . .

Wittgenstein's move has immediate consequences for our understanding of literature. . . . If we try to define what is particular about literary texts, we find that they put an emphasis not on what is said, but on how it is said; literary language makes itself manifest, it focuses more on the texture of expressions than on their content. . . .

Poetry . . . can be valuable for our understanding of language precisely because it offers concise and well-wrought formulations. By concentrating on the necessary and finding new ways of saying what is difficult to express, poets take language to its extremes – and sometimes beyond. Even when violating the rules that govern ordinary language they draw our attention to these rules and open them up to critique. . . .

What texts of all literary genres have in common . . . is that they . . . direct the readers' attention to language itself. In doing so, literature can illuminate our understanding of the workings of our language; it can become a tool for grammatical investigation. . . . In this way, literature can . . . contribute to raising our moral understanding, not by increasing our knowledge through the communication of information, but by describing situations that trigger our acknowledgement of the human condition.³⁶

In terms that are familiar to us, language can be an enemy, misleading us terribly. To try to avoid this we need to habitually pay 'attention to language itself', which structures our attention (*Attention). That is to say, we need to attend to our 'attention' (we will do well to resist imagining that the word 'attention' points to some 'objective' phenomenon), lest we get carried away into imagining that the reality constructed by our language is the only reality, which is not constructed. To take 'language' for granted, and to function in the world as if one's 'language' serves to point to things in it, is to become alienated from 'the human condition', alienated in a potentially destructive sense (*Alienation), becoming incapable of doing justice to a fellow human being who does not share the same language.

It may be part of the human condition that we need to 'take language for granted' at least for fleeting moments, if only for participating in routines that are essential for our survival. Selective attention is necessary to manage that bloomin', buzzin' confusion (*Attention). But good management – for doing justice – requires us to regulate our

³⁶ W Huemer, 'Introduction: Wittgenstein, Language and Philosophy of Literature', in J Gibson and W Huemer, *The Literary Wittgenstein* (2004) 1, 1-6.

selective attention. How can we learn to do this? Reading 'literary' works might be a good place to start. This 'literary' can be defined so as to include Wittgenstein's philosophy, White's law, Commons' economics, . . .

* * *

White's *Justice as Translation* opens with an outline of two images of language. One image is mechanistic in character: a 'vehicle or container' for 'pointing to something outside of itself'.³⁷ The other is organic in character: 'a repertoire of forms of action and of life'.³⁸ A difference between the two concerns spatial orientation, or in-out relations. Speaking of the organic image, White says:

The meaning of a sentence lies not only in what we tend to think of the sentence itself, in the words, but in the context, verbal and nonverbal, out of which it is constructed. Instead of thinking of language as a code into which nonlinguistic material is translated, or of language use as the manipulation of that medium for the expression of ideas, we can imagine languaging as a kind of dance, a series of gestures or performances, measured not so much by their truth-value as by their appropriateness to context.³⁹

The organic image directs us to an *activity*, fittingly called here 'languaging', whilst the mechanistic image directs us to an object, not a verb process but a noun thing. To attend to 'appropriateness to context' is to establish a base from which to take the topic of justice seriously.

White goes to suggest that we will do well to try and live harmoniously with both the organic and mechanistic images:

The two views of language . . . are at work in each of us all the time, in shifting and imperfect relation. It is no doubt sometimes right and helpful, indeed sometimes necessary, to act as if our language were transparent, merely a system of names We do it all the time, including, at moments, in the writing and reading of this book. It may even be useful to pretend for a moment that this is the right or only view of language, for to do this may permit a kind of analysis, of text-building, that has a value. But such a view is inherently

³⁷ *Justice as Translation* ix.

³⁸ *Ibid* xi.

³⁹ *Ibid* xii.

reductive—it requires the repression of what, in another state of mind, we know—and like all reductive systems it will ultimately be pathological unless we can find a way to respond to what it leaves out. One could not found a life upon it.

What is required is to learn to shift the focus of our attention so that we come to see language as a reality of its own and its forms as forms of life, with all that entails. Not that we would, or could, ever come to see language and nothing else; but we can hope that while we remain conscious of what we discern and desire in the world, and what we fear, we may become conscious as well of the languages through which we see these things, by which we act, in which we are ourselves embedded. To teach us how to do this has been one of the greatest tasks of imaginative literature from its beginnings. To do this completely is I think impossible, at least at the present stage of our intellectual development; but to try to do it is to move in the direction of completeness and inclusion, or what . . . I shall call ‘integration.’ The writing of this book is meant to enact at least the beginnings of such a movement.⁴⁰

White here, to use William James’ words, calls for ‘the awakening of the attention’⁴¹ – he invites us to be mindful of our ‘attention’ so as to constructively channel it (whatever ‘it’ may be).⁴² This calls for a reflexive disposition, for attention to be paid to attention (*Attention). To become ‘conscious’ of what one’s language ‘leaves out’ is a concern that takes White and his reader to the heart of the topic of justice. At the same time, White makes a place for what we might call an ‘economics of attention’, which would be concerned with organizing and reorganizing the way we attend the world and ourselves in it.

For White, language is an imaginatively created carrier of culture that we modify as we act with it and that changes us as users of it. He imagines the language of the law to be both similar to *and* different from ordinary language:

The ineradicable flux of language, and of the world, so recently discovered and lamented by the modernist who learns at last that the language and methods of ‘science’ are after all not good for all forms of thought and life, is actually structural to human experience, a condition of life that has been addressed again and again by our predecessors. What is required to face it is not a science in the usual sense but an art—the art of reconstituting language, self, and

⁴⁰ W James, *Principles of Psychology* (1890; 1981) 383.

⁴¹ ‘Attention’, said James (ibid 381-82) ‘is the taking possession of mind in clear and vivid form It implies withdrawal from some things in order to deal effectively with others.’

⁴² *Justice as Translation* ix.

community under conditions of fundamental uncertainty, and an art that is literary and rhetorical in character and of which we ourselves are the most important subject.

From this point of view, the law offers an especially interesting form of life, for at its central moment, the legal hearing, it works by testing one version of its language against another, and then by making a self-conscious choice between them. It is an institution that remakes its own language and it does this under conditions of regularity and publicity that render the process subject to scrutiny of an extraordinary kind. As an ethical or political matter, then, the structure of the legal process entails remarkable possibilities—little enough realized in the event—for thinking about and achieving that simultaneous affirmation of self and recognition of other that many (I among them) think is the essential ethical task of a discoursing and differing humanity. These possibilities arise from the fact that the premises of the legal hearing commit it to a momentary equality among its speakers and to the recognition that all ways of talking, including its own, may be subject to criticism and change.

The larger public world provides a less formally structured version of the same process, for it is not true that one sphere of life, say the economic or the intellectual, determines all the others. There is no privileged ground of analysis upon which we can stand, no privileged subject by explaining which we can explain—or ought to try to explain— everything else. At the collective level, then, we face exactly the same reciprocity that exists in the relation between the individual self and its culture more generally. We are always making ourselves, as individuals and communities, always making our language; yet we are always being made by our language, by our past, and by the actions of others, and the line between the maker and the made is never clear. This means, among other things, that our own habits of mind, of perception, and of feeling are contingent and changeable; they are a central part of our proper subject of attention, and this is true for us not only as citizens, or cultural actors more generally, but in our professional lives, as lawyers and teachers and writers. Our work cannot claim to have a validity beyond culture, beyond language, but should be seen as a way of working with and within language.

Talking about ethics or politics, or the public world more generally, thus itself becomes a species of what it describes: How ought we to talk in our own performances? About those performances? These questions invite us to be self-reflective, to make our own process of thought and speech the subject of our critical attention—for whatever we claim to believe about others must also be true for us. They invite us to resist the fallacies of reductionist theories that can account for everything in the world but themselves.⁴³

⁴³ Ibid 24-25.

White here calls again for the awakening of attention, which is influenced by one's languaging cum culturing. With 'language' and 'culture' placed *within* rather than 'beyond' us, White offers a version of Heraclitus' famous river image – 'you can't step twice into the same river'.⁴⁴ This is a world of ceaseless 'flux', with every 'sphere of life' in a constant process of transformation, including that which goes by the name 'economic'. The Socratic maxim 'Know Thyself' will be alive in the person who takes up 'the art of reconstituting language, self, and community'. So too will the Kierkegaardian amendment 'Choose thyself'.⁴⁵ That which we call 'the self' is not a fixed unit but an *activity*, which is like the law in the sense that it is in a continual process of becoming in our efforts to make sense of 'it'. (When might some economists transform the dominant image of *Homo economicus* into a self-constituting activity?) White's world of flux and the need to choose thyself in community and culture can serve to direct attention to the processes by which we reconstitute ourselves. In this regard, we may see (or, better, hear) 'the legal hearing' in a new light (or sound) and a vital opportunity to give the word 'equality' new meaning (*Equality).

* * *

Shall we compare White's world of flux to . . . ? Let us turn to the pioneering legal economist John Commons.

Commons was an unusual economist to the extent that he took the creative aspects of lawyering seriously – at least he did after he had participated in the process of drafting and working with legislation. Commons' *Legal Foundations of Capitalism* (1924) is the product of research in response to a request from the Governor of Wisconsin to draft a public utilities law and a law establishing an Industrial Commission for the state. The purpose of the public utilities law was to ascertain and enforce 'reasonable' prices. The purpose of the Commission was to ascertain and enforce 'reasonable' practices in relations between employers and employees, practices that came under such diverse headings as safety, health, child labour, and minimum

⁴⁴ D G Stern, 'Heraclitus' and Wittgenstein's River Images: Stepping Twice into the Same River' (1991) 74 *Monist* 579.

⁴⁵ See S Kierkegaard, *Either/Or* (Part II) (1843; 1987) (eds H V Hong and E H Hong). The maxim is repeated time and time again by Kierkegaard's Judge Wilhelm. For a suggestive commentary, see

wages for women and children. Commons set about studying court decisions relating to the meaning of 'reasonable'. Of particular interest to Commons was the threshold to which standards could be raised without being declared by the courts to be an unconstitutional taking of 'property' or 'liberty' of employers. (Commons gave particular attention to the Fifth and Fourteenth Amendments of the Constitution of the United States.⁴⁶) With his students he began 'digging directly out of the court decisions stretching over several hundred years the behavioristic theory of value on which they were working'.⁴⁷ This study marked the beginning of Commons' interest in the dynamics of language. During his study Commons learned that changes in the meanings of words corresponded with cultural change. In particular, he discerned that capitalism became what it is, and took the form that it has, in part because of judicial definitions of property and liberty in working out conceptions of reasonableness. Commons tells us in *Legal Foundations of Capitalism* that during the study: 'We found eventually that what we were really working upon was not merely a theory of Reasonable Value but the Legal Foundations of Capitalism itself.'⁴⁸

Concerning the topic of property, Commons was of the view that the familiar notion that 'property defines mine and yours' does not get us very far at all, especially in court. He urged the view that property rights are sets of relative capacities and constraints among people arising out of their relations to scarce things that they value. These capacities ('rights' and 'liberties') and constraints ('duties' and 'exposures') are not and cannot be precisely defined at any given moment. 'The law', he suggested, may be thought of as a fluid set of 'working rules',⁴⁹ loose *expectations* concerning what governmental officials will do if there is a conflict. When a conflict does take place over relative rights, a court decides what the working rule *is*, a decision that may become a precedent and thereby re-shape expectations about what judicial officials will do if there is a similar conflict.

Edward Mooney's 'Self-Choice or Self-Reception', the second chapter in his *Selves in Discord and Resolve: Kierkegaard's Moral-Religious Psychology From Either/Or to Sickness Unto Death* (1996).

⁴⁶ The Eminent Domain Clause of the Fifth Amendment, applicable to the federal government: 'No persons shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.' The Due Process and Equal Protection Clauses of the Fourteenth Amendment, applicable to state governments: 'Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

⁴⁷ J R Commons, *Legal Foundations of Capitalism* (1924; 1995) xxxv.

⁴⁸ Ibid xxxv-xxxvi.

Concerning his work in relation to the Fifth and Fourteenth Amendments, Commons put these constitutional provisions positively as follows: '[T]he government may deprive persons of life, liberty or property with due process of law and with equal protection of the laws.' The Equal Protection Clause, he stressed, has 'never . . . signified that individuals are equal or that they have equal rights.'⁵⁰ Rather, 'it signifies simply that all individuals belonging to the same class shall be treated equally, while treating differently . . . individuals of different classes.'⁵¹ This connects with 'the grand importance of precedent in Anglo-American jurisprudence', for 'precedent is the instrument of classification.'⁵² The selection of a precedent, Commons insisted, is not a mechanical activity:

[N]o dispute that comes before a court is exactly similar to any preceding one. Each case presents certain facts which, in their junction with the other facts of the case, have never before been exactly passed upon. . . . Thus every classification has two dimensions, the *inclusion* of all facts that are similar, along with *exclusion* of all that are dissimilar, and the *weighing* of each fact in order to determine its degree of similarity. This is the process of definition, and classification is definition.⁵³

This 'process' will be familiar to lawyers. As Commons put it in *Institutional Economics* (1934), it 'is the fundamental process of analogy . . . as practiced in the common-law method of reporting cases'.⁵⁴

'It is by this process of analogy', Commons went on to say, 'that the meanings of property, liberty, person, and "due process" have been gradually changed.'⁵⁵ With reference to the Fifth and Fourteenth Amendments, Commons described the law as an institution in which an inherited language is used to talk to one another about conflicting interests and is transformed in the process:

The hearing and decision are merely listening to pleadings and arguments and giving meaning to words; and it is by the changing of meaning of words that rights, liberties, duties,

⁴⁹ *Legal Foundations of Capitalism* 6, 67-8, 137-41.

⁵⁰ *Ibid* 345.

⁵¹ *Ibid*.

⁵² *Ibid* 346.

⁵³ *Ibid*.

⁵⁴ J R Commons, *Institutional Economics: Its Place in Political Economy* (1934) 716.

⁵⁵ *Ibid*.

and exposures are changed in the changing economic conditions. For the court proceeds . . . by the judicial process of weighing practices, customs, precedents, statutes, and constitutions in the light of changing conditions This process has required changing the definitions of all the words of the Fifth and Fourteenth Amendments to fit the economic and ethical changes of the past sixty years. The process is still going on. Further changes cannot be predicted, but the more important in the past, for the science of economics, have been the changes in the meaning of the words: person, liberty, property, due process, and equal protection.

For the meaning of all these terms arise out of the practices, customs, and habitual assumptions of the people and judges; and the changes that occur in these practices, customs, and assumptions bring with them changes in the meaning of words. Then, when conflicts arise between citizens and officials, the court itself must change the meanings of the terms as found in precedents, statutes, and constitutions in order to arrive at their application to the new disputes arising out of the change in conditions and assumptions. The court does so, not by trying to formulate academic or scientific definitions that shall be good for all time, but by the experimental process of 'exclusion and inclusion,' which is the universal process of the human mind by which language itself changes. By 'exclusion' a former meaning of these terms is deemed not to be applicable to the present dispute. By 'inclusion' the issue within a present dispute is brought within a former meaning which had not hitherto been deemed to include it. Thus constitutions, statutes, and even precedents change in process of time through the gradual but universal process of human speech which excludes old meanings and includes new meanings in order to fit the language to the changing practices and customs which require language to reach agreements.⁵⁶

For Commons, a feature of the judicial opinion is that it is part of a continuing and collective process of discussion, joining together the past and the future in the process of making 'changes in the meanings of words', a process that is not unique to the law but part of the 'universal process of human speech'. Commons believed that economists would do well to attend to this process in order become self-aware in regard to their inescapable contribution to the evolution of constitutions and other institutions. In terms familiar to us, he thought economists would do well to take a linguistic turn with the aim of reconstituting economic theory for the purpose of serving an ever-transforming constitution.

⁵⁶ Ibid 690-91.

Commons' analysis of the legal foundations of capitalism was central to his rejection of theories that have 'attempted to get rid of the human will and to explain economic phenomena as the working out of natural forces, either foreordained or blind.'⁵⁷ Such phenomena, he insisted, 'are the result of artificial selection and not of natural selection.'⁵⁸ (Drawing from the language of Charles Darwin, what distinguishes 'artificial' from 'natural' selection is the substitution of selection via the 'will of man' for selection via a brute process as the central factor shaping the direction of evolution.⁵⁹) What Commons called the 'art of political economy'⁶⁰ is not concerned with fine tuning Adam Smith's 'invisible hand', but deliberately creating the institutional structure upon which the 'hand' operates, and in doing so determining the direction of artificial selection. Smith's 'hand', Commons discerned, is not the hand of God, but the 'visible hand'⁶¹ of the law maker.

Commons' work gives particular attention to what we have heard White call the 'central moment' of 'the law', in which 'one version of its language' is placed 'against another' at a hearing, followed by 'a self-conscious choice between them'. Like White, Commons offers an expanded version of Heraclitus' river image, at the level of languaging. Commons was not an economic imperialist, for, to re-use White's words, he senses a meta-process in which 'all ways of talking . . . may be subject to criticism and change.' This means that our relationship with language cannot be talked about in terms of a simple opposition between inside and outside. The relationship, to keep with White's words, is one of 'reciprocity': we are 'always making our language' and 'we are always being made by our language' – 'the line between the maker and the made is never clear'.

⁵⁷ Ibid 376.

⁵⁸ Ibid. In *Institutional Economics* Commons distinguished natural selection and artificial selection this way: 'Natural selection, which is natural survival of the "fit," produces wolves, snakes, poisons, destructive microbes; but artificial selection converts wolves into dogs, nature's poisons into medicines, eliminates wicked microbes, and multiplies the good microbes. A holstein cow could not survive if left to natural selection – she is a monstrosity created by artificial selection for the sake of what she can do for man in the future' (636).

⁵⁹ Y Ramstad, 'On the Nature of Economic Evolution', in L Magnusson (ed), *Evolutionary and Neo-Schumpeterian Approaches to Economics* (1994) 65, 67. On the word 'selection', Ramstad (ibid) directs us to the *Chambers Biology Dictionary*, which says: 'The process by which some individuals come to contribute more offspring than others to form the next generation in *natural selection* through intrinsic differences in survival and fertility, in *artificial selection* through the choice of parents by the breeder.'

⁶⁰ *Legal Foundations of Capitalism* 379.

⁶¹ Ibid 204.

* * *

The predominance of machine imagery among economists means that to a significant extent Commons' work gathers dust on bookshelves. Economics is now commonly defined as 'the science of rational choice' (*Rationality), to use Richard Posner's definition.⁶² (With this definition, the task of economics 'is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions – what we call his "self-interest"'.⁶³) Behaviour is 'rational' when it is consistent with theoretical deductions; it has nothing to do with 'the state of mind of the chooser'.⁶⁴ This may seem simple enough for many of the initiated, but how are we to talk about the rationality assumption with those who are not (or with those who are and find the assumption troublesome)?

Arjo Klammer addresses that question in *As if Economists and Their Subject Were Rational* (1987), which sets out to think 'ethnographically' about what economists do.⁶⁵ Klammer, a leading contributor (with McCloskey) to a rhetorical turn in economics (*Rhetoric), addresses the question after an effort at what might be called 'rehabilitating the ordinary'. He does this when talking about the activity that is central to mainstream economics, namely, 'exchange':

If someone in an ice cream shop asked, 'Can I have a large ice cream cone?' most of us would be surprised if the person took the cone, said, 'Thank you,' and walked away. Clearly, we interpret the question as a *sign* that signifies a request to exchange money for an ice cream cone. The literal interpretation might make sense to an alien, but to those who 'know,' it is strange: probably funny, possibly offensive.

The knowledge that allows us to interpret a sign comes from past experience – in this case the experience that in a shop economic transactions take place, transactions that can be initiated with a friendly question. Such a question, therefore, is to be interpreted within the context of such experiences: the interpretation fills in what the articulated form leaves out.⁶⁶

⁶² R A Posner, *Economic Analysis of Law* (1972; 1992, 4th ed) 3.

⁶³ Ibid.

⁶⁴ Ibid 4.

⁶⁵ A Klammer, 'As If Economists and Their Subject Were Rational', in J J Nelson, A Megill, & D N McCloskey (eds), *The Rhetoric of the Human Sciences: Language and Argument in Scholarship and Public Affairs* (1987) 163.

⁶⁶ Ibid 174-5.

Klamer here offers some distance on what we do not only when we enter into an 'exchange' but also when we 'interpret'. What he says about the importance of 'past experience' in 'interpretation' brings into economics what many orthodox economists speaking in the name of (timeless or ahistorical) Science want to leave out.

Klamer then goes on to talk about the rationality assumption. He draws attention to difficulties concerning how it is talked about:

Because articulated signs are necessarily incomplete, as we cannot say everything in words, there are problems with the proper use and understanding of signs. Let us consider the statement under examination: 'Economic agents are rational.' Understanding a sign requires knowing how to use it. In the words of Ludwig Wittgenstein: 'Try not to think of understanding as a mental process at all – for *that* is the expression that confuses you. But ask yourself, in what sort of case, in what kind of circumstances do we say "now I know how to go on"?' He suggests that we look at the way an expression is used in the context of what he calls a language game. Knowing how to use the assumption is knowing the rules of the game. However, these rules cannot normally be articulated: they must be learned through example and practice. Michael Polanyi speaks of the tacit dimension of knowledge, using the example of a bicyclist who knows how to keep her balance but does not think about why she can. This is analogous to economists' view of the rationality assumption as a technique: they know how to use it after extensive practice through problem sets in graduate school, but they do not reflect on why it works. They take most of their language game for granted and do not talk about the context in which the statement that 'economic agents are rational' becomes significant.

The student of the rhetoric of economics faces the challenge of speaking about the unspoken, filling in the 'missing text' in economic discourse. The context of the rationality assumption is what allows the assumption to work for some and not for others.⁶⁷

For Klamer, who we might imagine to be a 'reflective practitioner' (one who moves beyond 'Technical Rationality to Reflection-in-Action'⁶⁸), economics will be taught poorly if a teacher fails to acknowledge the tacitness of economic knowledge, and therefore teaches by axiom and proof instead of by problem-solving and 'practice'. A good economics teacher will imagine a student's difficulty in 'understanding' the

⁶⁷ Ibid 175 – footnote omitted.

⁶⁸ S A Schön, *The Reflective Practitioner: How Professional Think in Action* (1983) 21.

rationality assumption not as a defect in the student's cognitive abilities but as a defect of her own instruction.⁶⁹

Klamer, by my reading, would have an economics student ask herself Lonergan's basic question, namely 'What am I *doing* when I am *knowing*?'⁷⁰ That (anti-object) *activity*-centered question, we can be sure, is one that White would place at the heart of an education.

Klamer, to reiterate, would have economics teachers connect themselves with ordinary activities. In this regard, Klamer echoes McCloskey's *The Rhetoric of Economics* (1985). Here is one fragment:

It is frustrating for students to be told that economics is not primarily a matter of memorizing formulas, but a matter of feeling the applicability of arguments, of seeing analogies between one application and a superficially different one, of knowing when to reason verbally and when mathematically, and of what implicit characterization of the world is most useful for correct economics. . . . Problem-solving in economics is the tacit knowledge of the sort Polanyi describes. We know the economics, but cannot say it, in the same way a musician knows the note he plays without consciously recalling the technique for executing it. A singer is a prime example, for there is no set of mechanical instructions one can give to a singer on how to hit a high C. The economist Arnold Harberger often speaks of so-and-so being able to make an argument 'sing'.

. . . The groundless claim that economic knowledge is axiomatic permits the teacher to spend the term developing the axioms, with an occasional theorem. It is easier to start with axioms of choice or definitions of unbiasedness than to defend the rhetoric from which they derive. It is hardest of all to teach how to argue like an economist, that is, how to enter the conversation of the field.⁷¹

'What is McCloskey up to here, talking about "feeling the applicability of arguments" and about "seeing analogies"?', many orthodox economists might ask. They might continue: 'Surely reasoning by analogy, as Posner has argued, has "no definite content or integrity; it denotes an unstable class of disparate reasoning methods."⁷² What is all this about comparing a musician and a singer to an economist? What is all this about

⁶⁹ Here I echo Schön, *ibid*, 66. He echoes John Dewey.

⁷⁰ That is a central question in Lonergan's *Insight*, *op cit*, xxii.

⁷¹ D N McCloskey, *The Rhetoric of Economics* (1985) 178-9.

⁷² R A Posner, *The Problems of Jurisprudence* (1990) 86.

“defend the rhetoric”? What “rhetoric”? And what is all this about “conversation”? Economics is a “conversation”?’

The Rhetoric of Economics started a great deal of *conversation* about the nature and significance of economics and about the place of economics in the conversation of humankind. McCloskey’s hope, to be sure, was not so much to start such debate but to improve the quality of debate in economics generally. For this, McCloskey suggested that economists direct their ears to other disciplines, including law:

At the broadest level it is worth noting that the practice of economic debate often takes the form of legal reasoning, because, as Booth put it, ‘the processes developed in the law are codifications of reasonable processes that we follow in every part of our lives, even the scientific’. Economists would do well to study jurisprudence, then, with some aim other than subordinating it to economic theory. . . . [T]he legal analogies of economic reasoning . . . are many. Like jurists, for instance, economists argue by example, by what Edward Levi calls ‘the controlling similarity between the present and prior case’.⁷³

We might do well to compare the activity of being a lawyer with the activity of being an economist. Attending to what the lawyer and the economist have in common may be surprising, at least to those who have yet to take *activity* seriously.

⁷³ McCloskey, op cit, 72 (references omitted).

Alienation

In 1990, scholars from various disciplines (anthropology, economics, education, psychology, social philosophy, sociology, among others) addressed the theme of alienation at the 12th World Congress of Sociology, held in Madrid. Out of the meeting emerged 14 chapters in a volume titled *Alienation, Society, and the Individual* (1992).¹ In the spirit of Karl Marx,² the chapters claim or imply that 'alienation' ('economic', 'psychological', among other forms) is an undesirable condition to be overcome – one word for the goal is 'dealienation'.³ The organizers might have done well to invite White, who had then recently used the word 'alienation' in a markedly different sense. In *What Can a Lawyer Learn from Literature?* (1989), White says this about the activity of reading a 'literary text':

The very process of engagement with a literary text is . . . transformative in kind: it teaches not only by offering 'insights' translatable into other terms – new propositions of fact or logic or value – but transforming the self, as we become our own version of what the reader has to be to understand and respond to it. Thus the reader of a Platonic dialogue, to read it well, must become a partner in the dialectic process that it not only recommends but performs; this will require her, like the Socratic interlocutor, to undergo an alienation from the commonplaces by which she has organized her life. So too, the reader of a Jane Austen novel, if he does his reading well, will find his own initial opinions, say of Emma's

¹ F Geyer and W R Heinz (eds), *Alienation, Society, and the Individual: Continuity and Change in Theory and Research* (1992).

² The chapter offering the fullest discussion of Marx's work is D Schweitzer, 'Marxist Theories of Alienation and Reification: The Response to Capitalism, State Socialism and the Advent of Postmodernity', chapter 3, pp. 27-52. Some details for those not familiar with Marx's work are as follows. 'Marx's theory of alienation is organized around his . . . concept of alienated labour, developed in the first fragment of the *Economic and Philosophical Manuscripts* of 1844' (28). Marx complained that the wage labourer was 'alienated' from the product of his 'labour'. The world of 'commodity production', for Marx, had something of a life of its own, a life hostile to the worker, who becomes little more than a commodity. The life of work, instead of being the free and creative expression of 'self', becomes a vehicle for 'self-alienation'. To be alienated in this sense is to be separated from one's own nature. Marx's formulation of alienation, perhaps needless to say, 'is grounded in a . . . set of assumptions concerning the human condition' (27).

³ A Oldenquist, 'Autonomy, Social Identities, and Alienation', chapter 3, pp. 53-60, 56.

selfishness or Fanny's meekness, repeatedly disturbed and corrected, a process that should move him in the direction of greater generosity as well as greater accuracy of judgment.⁴

In the 'process of engagement' with White, who makes connections between apparently unconnected works, such as 'a Platonic dialogue' and 'a Jane Austen novel', we may well 'undergo an alienation from the commonplaces by which we have organized our lives.' The 'transforming' process can be imagined a beneficial one to the extent that it 'should move [us] in the direction of greater generosity as well as greater accuracy of judgment.' Let us unpack and explore these and related claims, especially that concerning the possible virtues of 'alienation'.

Before doing so, a comment on using the word 'alienation'. The word is a key one in our culture.⁵ White's unusual usage could significantly transform our culture if it is taken up by an influential community. We might wonder what might become of the word. The literary and cultural critic Mikhail Bakhtin says this on the life of a word:

The word in language is half someone else's. It becomes 'one's own' only when the speaker populates it with his own intention, his own accent, when he appropriates the word, adapting it to his own semantic and expressive intention. Prior to this moment of appropriation, the word does not exist in a neutral impersonal language (it is not, after all, out of a dictionary that the speaker gets his words!), but rather it exists in other people's mouths, in other people's contexts, serving other people's intentions: it is from there that one must take the word, and make it one's own. And not all words for just anyone submit equally easily to this appropriation, to this seizure and transformation into private property: many words stubbornly resist, others remain alien, sound foreign in the mouth of the one who appropriated them and who now speaks them; they cannot be assimilated into his context and fall out of it; it is as though they put themselves in quotation marks against the will of the speaker.⁶

We might wonder if many of the participants at the 12th World Congress of Sociology would have sensed White's use of the word 'alienation' to be somewhat 'alien' in their mouths. 'What might become of us', they might have collectively expressed, 'if we appropriate' his usage?' Might leaving his 'alienation' in quotation marks prevent an

⁴ J B White, 'What Can a Lawyer Learn from Literature?' (1989) 102 *Harvard Law Review* 2014, 2019-20.

⁵ See R Williams, *Keywords: A Vocabulary of Culture and Society* (1976; 1983).

alienation from their ordinary usage of the word and thus from the image of the world associated with it?

* * *

The general reader who picks up White's course book for the first time can expect to become perplexed as to where to fittingly place it in the world of books. In the abridged edition (1985), White offers some prefatory remarks that can help the reader to do some tentative placing:

In its original form this book was cast as a course book for law students. It asks, and is intended to help them to become literary and cultural critics and to learn to apply their talents of analysis to the discourse of the law, both as that discourse is employed by others and as they themselves put it to work in their own writing. In the process of abridgment I have removed much of the more technical legal material, with the aim of rendering the book more readily available to the general reader. In its present form, I believe, it asks nothing significant of its reader for which a legal training is necessary.

Of course this book is still formally addressed to a 'law student,' but I trust you can take that as the sort of fiction that it is – a bit as though this were an epistolary novel, perhaps, in which the reader is one of the characters – and I hope that you may even take some pleasure and interest in what happens to this 'reader' as the text progresses. My object in this book is to make a place for myself and to help my reader do likewise, a position from which the world, and our contributions to it, can be seen and judged in a new way. This book is meant to lead the law student away from the law to such a position, which must be largely of his or her own making. For other readers, it does not seem to matter much whether they approach it from the legal side or from some other direction: from that of literary criticism, for example, or certain sorts of anthropology or sociology, or philosophy or history, or indeed, perhaps most fruitfully of all, from the experience of ordinary life.⁷

The Legal Imagination could perhaps be fittingly imagined as a contribution to the *Bildungsroman* – novels of 'formation', which deal with education, culture, identity, and development.⁸ The 'formation' takes place through a process of disorientation and

⁶ M Bakhtin, *The Dialogic Imagination* (1981) (ed M Holquist) 293-94.

⁷ *The Legal Imagination* (1985 – abr ed) xi.

⁸ See, for example, F Moretti, *The Way of the World: The Bildungsroman in European Culture* (1987). For discussion distinguishing several types of 'novels of education', see M M Bakhtin, 'The *Bildungsroman* and

reorientation, or what might be called 'alienation'. White's book, the heart of which could be said to be about 'place'-making, seemingly has a place for anyone and everyone, perhaps even people committed to 'certain sorts' of economics.

This entire Thesis may be read a response to White's invitation 'to make a place . . . from which the world, and our contributions to it, can be seen and judged in a new way.' In an effort to 'make a place', the word 'alienation' may be of great value in a vocabulary of criticism, the development of which is one task for White's reader.⁹

* * *

'What does it mean to learn to think and speak like a lawyer?'¹⁰ That is a fundamental question with which *The Legal Imagination* opens. 'The readings and the writing assignments', White says, 'can be said to elaborate and complicate that question.'¹¹ He continues:

In the course of the book the student is asked to write as a lawyer, judge and legislator, and to reflect as a mind and a person on what he has done, to speak in his own voice about his experience of writing and thinking. He is asked to see what the lawyer does as a literary activity, as an enterprise of the imagination, with respect to which both success and failure – if he can define them – are possibilities for him. He must judge for himself what these possibilities are. The demand is upon his imagination, his ability to make sense out of what he does by looking beyond it.¹²

In White's integrative spirit (*Integration), this is a course not in law *and* literature but law 'as' literature, a course for finding and making one's 'own voice'. From where and to whom does one 'speak'?

Its Significance in the History of Realism', in M M Bakhtin, *Speech Genres and Other Late Essays* (1986) 10. On 'the most significant . . . type', Bakhtin writes (23-4):

In such novels as . . . *Wilhelm Meister* . . . man . . . emerges *along with the world*. He is no longer within an epoch, but on the border between two epochs, at the transition point from one to another. The transition is accomplished in him and through him. He is forced to become a new, unprecedented type of human being. What is happening here is precisely the emergence of a new man. . . . It is as though the very *foundations* of the world are changing, and man must change with them. Understandably, in such a novel of emergence, problems of reality and man's potential, problems of freedom and necessity, and the problem of creative initiative rise to their full height.

⁹ *The Legal Imagination* 688.

¹⁰ *Ibid* xix.

¹¹ *Ibid*.

¹² *Ibid* xix-xx.

In a section titled 'Judgment Without Labels – The Sentencing Decision', White and his reader 'attempt to find an occasion where the law addresses the human personality fully and directly, where a legal speaker does justice to the complexity and profundity of the experience of another.'¹³ As part of the attempt, White offers a 'note' on how Jane Austen's *Pride and Prejudice* (1813) 'might be read in such a way as to shed light on the problems of the sentencing judge.'¹⁴ Contemplating models of excellence in judgment to whom we can turn to, White says this about the Austen's hero and heroine:

There is one success we can look to – not as a model of perfect judgment perhaps, but it is a genuine success. Darcy's judgment of Elizabeth is at first impeded by a stupid, if explicable, pride that leads him to a gross rudeness to Elizabeth; her judgment (not unaffected, one might suppose, by Darcy's remark) is apparently discolored by a prejudice against Darcy that leads her to misinterpret his behavior and misjudge his qualities, and indeed blinds her usually acute critical sense with respect to Wickham. When Darcy finally does ask for her hand, it is in the most patronizing way; her rejection is sufficiently violent, one might imagine, to close off the future entirely. How is it that they come together at the end? What do they have that overcomes their own misjudgments, that leads to success at last? . . . An obvious part of the answer is this: each has the capacity to move to a new position from which the old self can be regarded and rejected. Judgments not only of others but of oneself can be discarded. . . . What do you call this process? Does the sentencing judge have any need of it? Do you?¹⁵

The ability to identify 'prejudice' in 'oneself' is clearly one important ingredient in 'the capacity to move to a new position from which the old self can be regarded and rejected'. It would seem that one will need to be able to step into the shoes of another, who imagines the world from a different position, in order to identify such prejudice. This ability could be connected with a collection of character strengths and virtues such as creativity, integrity, open-mindedness, and wisdom. These will be vital for a person to get outside his or her reality into the reality of others. This 'alienation' can provide materials for making some sound judgments, in and out of the law.

¹³ Ibid 364.

¹⁴ Ibid 401.

¹⁵ Ibid 405.

A major turning point in *Pride and Prejudice* is heroine's rereading of the letter in which Darcy justifies his conduct toward Bingley and Jane and Wickham. The passages in which Elizabeth rereads the letter suggest a mind resembling a lawyer's:

But when this subject was succeeded by his account of Mr. Wickham, when she read with somewhat clearer attention, a relation of events, which, if true, must overthrow every cherished opinion of his worth, and which bore so alarmingly an affinity to his own history of himself, her feelings were yet more acutely painful and more difficult of definition. Astonishment, apprehension, and even horror oppressed her. She wished to discredit it entirely, repeatedly exclaiming, 'This must be false! This cannot be! This must be the grossest falsehood!' – and when she had gone through the whole letter, though scarcely knowing anything of the last page or two, put it hastily away, protesting that she would not regard it, that she would never look at it again.

In this perturbed state of mind, with thoughts that could rest on nothing, she walked on; but it would not do; in half a minute the letter was unfolded again, and collecting herself as well as she could, she again began the mortifying perusal of all that related to Wickham, and commanded herself so far as to examine the meaning of every sentence. . . . [W]hen she read, and reread with the closest attention, the particulars . . . She put down the letter, weighed every circumstance with what she meant to be impartiality – deliberated on the probability of each statement – but with little success. On both sides it was only assertion. Again she read on. But every line proved more clearly that the affair . . . was capable of a turn which must make [Mr. Darcy] entirely blameless throughout the whole.

The extravagance and general profligacy which he scrupled not to lay to Mr. Wickham's charge exceedingly shocked her; the more so as she could bring no proof of its injustice. . . . After pausing on this point a considerable while, she once more continued to read. . . .

How differently did everything now appear in which [Mr. Darcy] was concerned! She grew absolutely ashamed of herself. Of neither Darcy nor Wickham could she think without feeling that she had been blind, partial, prejudiced, absurd.

'How despicably have I acted!' she cried. . . . ' . . . – Had I been in love, I could not have been more wretchedly blind. But vanity, not love, has been my folly. Pleased with the preference of one, and offended by the neglect of the other, on the very beginning of our acquaintance I have courted prepossession and ignorance, and driven reason away, where either were concerned. Till this moment I never knew myself.'

... When she came to that part of the letter in which her family were mentioned, in terms of such mortifying, yet merited reproach, her sense of shame was severe. The justice of the charge struck her too forcibly for denial ...

After wandering along the lane for two hours, giving way to every variety of thought; re-considering events, determining probabilities, and reconciling herself as well as she could, to a change so sudden and so important, fatigue, and a recollection of her long absence, made her return home; and she entered the house with the wish of appearing cheerful as usual, and the resolution of repressing such reflections as must make her unfit for conversation.¹⁶

That passage provides fragments of a vocabulary that one could develop for talking about the (de)alienating experience of becoming aware of unrecognised 'prejudices' and the process of coming to a reasoned judgment about an event (including a text). This is about 'reread[ing] with the closest attention' to 'particulars' and to 'myself' for the purpose of achieving 'impartiality', of doing 'justice'. The experience is of the kind that leads one to say, 'Till this moment I never knew myself.' Here there may well be 'feelings' that are 'acutely painful and ... difficult of definition'. The presence of this dramatic learning experience puts *Pride and Prejudice* into the *Bildungsroman* category.¹⁷

In the process of engaging with *Pride and Prejudice* for the purpose of responding to his questions, White's reader is provided with a resource for talking about White's book. Having perhaps wondered why on earth a law student should be reading a Jane Austen novel, she can do some 'wandering ... , giving way to every variety of thought', and come up with an utterance resembling 'Till this moment I never knew myself.' With this de-alienating 'return home', she can give a new form of attention to herself, including 'the closest attention' to attention itself (*Attention). What we call 'attention' is the stuff of the ordinary, which can be readily transformed into the extraordinary, if given a little attention. This ordinary, given a little productive alienation, may become the heart of nothing less than justice, which might be said to begin in attention, close attention.

¹⁶ J Austen, *Pride and Prejudice* (1813; 2004) 376-386.

¹⁷ The term '*Bildungsroman*' has been used in relation to *Pride and Prejudice* – see, for example, F Moretti, op cit, 56-61. The label has also been used in relation to *Mansfield Park* – see J McDonnell, "'A Little Spirit of Independence': Sexual Politics and the Bildungsroman in *Mansfield Park*' (1984) 17 *Novel: A Forum on Fiction* 197.

* * *

For several generations, a great many economics students have been repeatedly told to 'think at the margin'. (Historians of economic thought speak of the 'Marginal Revolution', a movement in the late 1800s that channeled attention on incremental adjustments – including 'marginal' changes in 'utility' derived from incremental changes in the consumption of a commodity.) Students are immersed into a world of 'marginal benefits', 'marginal costs', and 'marginal profits', typically in the service of giving theoretical legitimacy to an unduly narrow reading of Adam Smith's 'invisible hand' metaphor. After reading White, an economist may find it difficult to hear the phrase 'thinking at the margin' in the ordinary way again.

White's reading, in *When Words Lose Their Meaning*, of Homer's *Iliad*, could serve as an especially productive challenge. His reading introduces us to an 'epic language', a language that is 'especially appropriate to the celebration of the particular heroic culture of the *Iliad*, which is defined for us in Book One and elaborated on in the rest of the poem.'¹⁸ Here, 'the great aim of life is the acquisition and maintenance of honor, particularly in the form of battle-prizes'.¹⁹ As part of his introduction, White directs our attention to his use of the word 'culture':

But this summary of the values and structure of the world of Book One, while in its way informative and, I believe, accurate enough, says little about the way the culture works, either in the imagined life of the poem or in the actual experience of the reader. For a culture, real or imagined, is not a scheme or a structure but a way of living, and, to be understood, it must be seen as offering a set of resources for speech and conduct: a set of things that it is possible on certain occasions to say—by way, for example, of appeal, command, claim, or argument; and a set of things that it is possible to do, a set of moves with force and shape and meaning of their own—such as the offering of a ransom for one's daughter or the calling of an assembly.²⁰

White here sounds to me to be in tune with the emergence of a reflexive 'interpretive anthropology', which is a movement offering a multiform collection of reflections

¹⁸ *When Words Lose Their Meaning* 27.

¹⁹ *Ibid.*

²⁰ *Ibid* 27-8.

upon the nature of 'culture'.²¹ That which we call 'culture' is not simply a 'thing' that is 'out there' but a fluid process, which evolves as we reconstitute ourselves and our relations with others when we use our language.

The *Iliad* opens with a plea from Chryses, a priest of Apollo, whose daughter has been carried off by the Achaeans in one of their many raids. His plea is to the Achaean camp to accept a ransom and let his daughter go. His daughter has been assigned to the king who commands the Achaean army, Agamemnon, as a battle prize. When Agamemnon refuses to return the girl, Chryses prays for assistance to Apollo, who sends a plague that begins to devastate the Achaeans camp. After nine days of the plague, Achilles, leader of one of the largest contingents of the Achaean army, calls an assembly and suggests that a prophet be consulted. The prophet says that, to appease Apollo, they must return the girl to her father. Agamemnon is less than impressed with this verdict but acquiesces in it. He claims, however, that he should be compensated for his loss. When Achilles resists, Agamemnon claims Achilles' prize, the girl Briseis. A dispute between Achilles and Agamemnon has begun. 'Thus arises', says White, 'the wrath of Achilles, the career of which is the subject of the poem.'²²

A key issue becomes the 'character of Agamemnon's relation to the other warriors, especially to Achilles.'²³ This issue involves an awkward tension of hierarchy versus equality: Agamemnon is 'an equal among equals, for that is what it means to be an Achaean warrior', but 'he is also in some undefined sense the leader of the expedition', though 'he is the inferior of Achilles, whose preeminence in battle is unquestioned.'²⁴ Out of their conflict emerges 'a self' placed 'on the margins of a world':

It is clear enough that in [Achilles'] anger he will withdraw, but it is most unclear what that will mean, for him or for us. Achilles at first threatens to return to his home in Phthia . . .

²¹ See G E Marcus and M M J Fischer, *Anthropology as Cultural Critique: An Experimental Moment in the Human Sciences* (1986). 'Commentary on developments in anthropological thought during [the 1960s and 1970s] has tended to focus on the shift in stress from behavior and social structure . . . to meaning, symbols and language, and to a renewed recognition, central to the human sciences, that social life must fundamentally be conceived as the negotiation of meanings. Interpretive anthropology thus gives priority to the study of the "messier" side of social action, which had been relegated to marginal status in perspectives that instead emphasized the study of behavior, objectively measured and assessed by the detached scientist' (26).

²² *When Words Lose Their Meaning* 28.

²³ *Ibid* 38.

²⁴ *Ibid*.

But in fact he does not go back to Phthia. The reason is that his goal in life is honor gained in a life of action, and honor, like language, is a function of community. He could never be honored in Phthia in a way that would redress the dishonor he has suffered here. He needs the Achaeans as much as they need him, although for different reasons. He cannot be wholly part of this world, yet he cannot wholly leave it; it is by force of this necessity and not by plan that he becomes a figure on the edge of things, awaiting his moment between the unknown and known.²⁵

The location of the self on the margins of a world, which happens almost by accident—perhaps its significance was a surprise even to the poet—is a literary and intellectual invention of the first order. It runs from the *Iliad* straight through to such modern figures as Thoreau and Huckleberry Finn and is a literary idea as powerful as the other great Homeric form, the tale of travels. These are both ways of directing attention to the nature of the world from the outside, by comparison or denial. Not that Achilles will prove to be an alienated hero of the modern sort, who works his way out of his society to face the ultimate meaninglessness of things and to fashion an identity for himself. He is not critical of himself and his criticism of others never purports to be disinterested; he is a creature of passion, not of intellect; he returns to and in a sense becomes a hero of his world. But, as we shall see, what the poet will make of Achilles' movement to the margin of his world is nothing less than the beginnings of social awareness and criticism.²⁶

White here provides a resource for thinking about the meaning of the title of his book, *When Words Lose Their Meaning*. We can be sure that its author is not 'an alienated hero of the modern sort, who works his way out of his society to face the ultimate meaninglessness of things . . .' White may be read as being concerned with ways we can respond in circumstances *when* words lose their meaning.²⁷ The experience of words losing their meaning may be a significant moment in the life of a person (and also a society), as it is with Achilles. The experience may be the beginnings of becoming 'an alienated hero of the modern sort', and it may be the beginnings of an alienated hero of another sort, such as Homer.

²⁵ Ibid .

²⁶ Ibid 38-9.

²⁷ See White's "'Our Meanings Can Never Be the Same": Reflections on Language and Law' (1991) 21 *Rhetoric Society Quarterly* 68, 69.

White, I suggest, is concerned with 'another sort'. Let us hear what he has to say about Homer, who as a writer managed to transform his language and give it new kinds of meaning:

The primary way in which Homer moves his reader from a position within his imagined world, and accepting of it, to an external position from which he can be seen and judged is by organizing the traditional epic materials into patterns of meaning that have significance different from anything that is or could be said directly in the epic language itself. He works by an art of juxtaposition that at once distances the reader from the heroic culture and defines a central value by which it can be judged.

Simone Weil speaks to this point in a famous essay celebrating what she calls the 'extraordinary sense of equity' in the *Iliad*. Homer describes Achaean and Trojan deaths . . . in identical terms, expressive of identical feelings; and in doing this he enacts for us a central value of the poem—a value distinct from those expressed by any character in it: the recognition of the equal humanity of the people who must suffer on both sides. 'One is barely aware that the poet is a Greek and not a Trojan.'

The characteristic of the Homeric style that Simone Weil identifies here is not confined to the death passages but runs throughout the poem: it is that context seems to have little effect on statement. A death is a death, Trojan or Achaean; a feast or voyage is presented in similar terms whatever the occasion; the same language describes the same events. It is a little as if each item were a polished bit or shape that was placed, without itself being changed, next to others, themselves unchanged. One consequence of this style is that there is on the surface of things a remarkable equality of treatment, a lack of hierarchy or priority. This is an 'equity' that goes far beyond impartiality between Achaean and Trojan. It is an acceptance of the conditions of existence so strong as to become a marvelous hospitality to life in all its forms and aspects, a love of the world itself.²⁸

With this 'art of juxtaposition', claims White, Homer creates with his reader a 'friendship', the 'heart' of which 'is a special kind of teaching: this poem teaches us by moving us from a position within the heroic world to another external to it, based on the recognition of the common humanity of all who must die.'²⁹ This, for White, 'is at

²⁸ Ibid 39-40. (The quotations come from S Weil, 'The *Iliad*, or The Poem of Force' (1945) 2 *Politics* 321 – originally published in French in 1940.)

²⁹ Ibid 57.

once the simplest and most profound of truths, and it is the center of value of the poem.’³⁰

This ‘center of value’, I suggest, can serve as a resource for economists and others to revalue ‘thinking at the margin’, by speaking from the margins, where one can sense economic imperialism for what it is and can suggest that it be put in its proper place as one language among many (*Rationality).

* * *

In some prefatory remarks to *Acts of Hope*, White offers some suggestive material concerning the possible virtues of alienation. After speaking of ‘languages’ as ‘systems of authority’ he goes on to elaborate with reference to in-out orientation:

Think of learning one’s native language, for example, as we all have done: to be understood at all we must speak it as it is spoken by other people, employing its terms and categories and gestures; yet our experience is never exactly the same as that of others, we have our own thoughts and feelings, and the question naturally arises, How adequate is our language to what we know, to what we have become? How far are we free, and able to transform it? Huckleberry Finn, to take a clear and familiar example, grew up in a world in which the most important fact about any person was his or her race, and in which ‘nigger’ was a standard term of description and address; then he found himself the friend of a runaway slave, without a language in which to describe that relation, which in turn meant without a way of imagining his life in his world. There was nothing to do at the end but ‘light out for the territories,’ which is not a possibility for any of us.

While that experience of Huck Finn might be thought extreme, we all have something like it. An ordinary part of growing up, for example, is that the young person finds the language she has inherited from her parents, with all its commitments to particular social practices and attitudes, most unsatisfactory; she feels she has to struggle, sometimes unsuccessfully, to find a language in which to express what she thinks and is, a language with which to make her future. What makes it even harder is that she has to do this as one who is partly made by what she wants to criticize, for we are all to a large degree shaped by the very institutions and practices whose authority we question. There is no clear line between inner and outer reality.

³⁰ Ibid.

Sometimes a person experiences a similar collapse of confidence in the language of the larger culture too, suddenly seeing that it cannot say or do what he dimly feels it should. Such moments can be the occasion for great art or politics: Homer, in the *Iliad*, presents Achilles as coming to see as alien the language of honor upon which he has built his life, and in so doing makes a poem that is a great act of cultural and political criticism; Plato, in his dialogues, subverts and transforms the language of value by which his culture lived; Lincoln, in his public speeches, redefines our Constitution as rooted in the equality of all people. One aim of certain texts—in American literature the works of Emerson, Melville, and Dickinson stand out—is to induce such a collapse of language in the reader and by doing so to open up new possibilities for thought and life.³¹

White here may be read as promoting the recovery of the 'ordinary', directing attention to what 'we have all done', to an 'experience' that 'we all have something like'. We can be sure that he wishes to 'transform' the ordinary into the extraordinary, a movement that can be talked about in terms of 'alienation'. We may suspect that White composed *Acts of Hope* with the hope that the book would 'induce . . . a collapse of language in the reader and by doing so to open up new possibilities for thought and life.' Such an aim may sound radical for some people. Imagine, for example, hoping that a Marxist philosopher comes to sense as alien the language of alienation upon which she has built her life. Or imagine hoping that a Chicago economist comes to sense as alien the language of efficiency upon which he has built his life. Or imagine hoping that a legal positivist comes to sense as alien the language of sovereignty upon which she has built her life. And so on.

* * *

White is not unique with his concern with the possible virtues of alienation. The German playwright and literary critic Bertolt Brecht, who sought to dramatize Marx's images of capitalism, was a forerunner in this regard. One commentator tells us:

Brecht . . . employed a set of devices in staging, music, acting, and the telling of parable, to confound an audience's comfortable identification with characters and story as encouraged by conventional realism Together, these techniques produced the 'alienation effect'. It would be an error to think that Brecht wished in this way to reinforce alienation in Marx's

³¹ *Acts of Hope* x.

sense. His intentions were precisely the opposite: to induce a 'critical attitude' that would dispel the passivity necessary to the maintenance of the conditions producing alienation under capitalism. A measure of this difference appears in the term he used in German. Marx's word was *Entfremdung* while Brecht wrote of the *Verfremdungseffekt*, for which a better translation would be 'de-alienation' effect. As such, it is related to similar devices in modernist theory and art such as 'defamiliarization' and 'estrangement', though these have not always had the overtly politicizing intention of Brecht's method.³²

Brecht evidently shared with others an image of art 'as a means of productive reorientation'.³³ Percy Shelley, for example, described poetry as making 'familiar objects to be as if they were not familiar'.³⁴ And William Wordsworth sought to make 'the strange familiar and the familiar strange'.³⁵ White's work can be read as a landmark contribution to this tradition.

* * *

With White's *The Legal Imagination*, to revisit Milner Ball's remark quoted at the end of the Introduction to this Thesis, 'there began a reconstitution of legal scholarship: who and what was publishable and where and what counted as a real law review article for tenure.' White, we might say, established an authority of a certain kind – given what he has done, other possibilities have opened up, and he legitimates them. White's book 'had a specific, practical consequence' for Ball in 1975: 'The editor in chief of the *Stanford Law Review* convinced a reluctant board of editors to publish a piece of mine about courts as theater', and 'part of the case . . . made to his colleagues was the fact and precedent of White's book.'³⁶ Let us turn to a fragment in the essay:

Courts may not always or even frequently do justice, but their theatrical quality does contribute to their potential for doing justice by encouraging disinterestedness in the decisionmakers. As actors, judge and jury are asked to play parts in a government of laws and not of people. . . . Fulfillment of the roles enables judgments which rise above prejudice

³² P Brooker, *A Glossary of Cultural Theory* (2002) 5.

³³ P Brooker, *Bertolt Brecht: Dialectics, Poetry, Politics* (1988) 68.

³⁴ Quoted in Brooker, *ibid.*

³⁵ *Ibid.*

³⁶ M S Ball, 'Confessions' (1989) 1 *Cardozo Studies in Law & Literature* 185, 194, n 6.

and which, therefore, will more likely be just. Not the least hoped for result of the theatrical trappings and conventions of judicial proceedings is to educe such performances.

Judge and jury are audience as well as actors and in this capacity also may be encouraged to make unprejudiced judgments. Actors may be drawn beyond themselves by the roles they play, but they are not thereby totally absorbed in their parts for they maintain control of the characters they create on stage. An equivalent mix of involvement and detachment is also possible for the audience. A production which works absorbs the audience. The involvement is not total, however, for there remains a separation which arises from the consciousness that what is being witnessed is a theatrical action. The separation allows the audience to make impartial judgments about what it sees.

Bertolt Brecht observed the phenomenon of audience involvement and separation and exploited it through the 'alienation effect.' Alienation, in this sense, is the art of placing an action at a distance so that it can be judged objectively and so that it can be seen in relation to the world—or rather, worlds—around it. Alienation stimulates conscious judgment by keeping the audience from simple identification with the characters of the play. . . . This . . . attitude of limited identification with attorneys or parties while observing them and forming judgments about them is the attitude appropriately developed in judge and jury as audience.³⁷

For Ball, there is merit in actively seeking an experience of 'alienation' to the extent that one can constructively manage the control of 'distance' between the self and those being judged.³⁸ His suggestion is in part an attempt to make a case for what it might mean for a 'judge and jury' to 'do justice' or to 'be just'. This involves putting together a 'mix of involvement and detachment' along with 'conscious judgment'.

It may have been interesting to observe the process by which the editor in chief of the *Stanford Law Review* 'convinced a reluctant board of editors to publish' Ball's essay. In reading the essay, did the board of editors experience the kind of 'alienation' talked about by Ball? (Did they say, for example, 'Our image of what we call "the law" has been dramatically transformed by this innovative essay.')

If so, was this experience talked about at the level of 'doing justice' to Ball's essay? We might wonder if the editors initially found Ball's word 'alienation' to be somewhat 'alien' in their mouths.

³⁷ M S Ball, 'The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater' (1975) 28 *Stanford Law Review* 81, 100-02 (footnotes and quotation-marks omitted).

³⁸ It perhaps goes without saying that Ball is not using the word 'objectively' in the customary sense, which is in opposition to 'subjectively'. He would have us complicate and enrich the opposition.

* * *

In *Living Speech*, White directs his reader to Ball's essay comparing courts with theater.³⁹ He does so in a section comparing 'the cultural form of the Athenian tragedy' and 'the American judicial opinion'.⁴⁰ White's aim here is not what some would call 'merely academic':

The idea is not to draw abstract lines of similarity and difference between these two genres of thought and expression, but to try to capture something that is at work in both institutions, in fact essential to what each at its best achieves: to show how it is that the best instances of both forms resist the ever-present impulse to erase and trivialize human experience and instead confer upon the individual, and his or her struggles in the world, an essential dignity.⁴¹

This 'essential dignity' is intimately connected with White's efforts in *Living Speech* to give content to the word 'justice'.

White turns his attention to a single judicial opinion, namely Justice Harlan's opinion in *Cohen v California*.⁴² Echoing some of the spirit (or, better, demon) of the era of the Vietnam War, Paul Cohen wore a jacket in a Los Angeles courthouse wearing a jacket bearing the words 'Fuck the draft'. He was arrested and convicted for violating a California statute that made it an offense to 'maliciously and willfully disturb the peace or quiet of any neighborhood or person . . . by . . . offensive conduct.' The Supreme Court had to decide whether Cohen's speech was punishable because it fit one of the 'exceptions' to free speech protected by the First Amendment. White's interest in the case centers on the relationship Harlan establishes with the rude phrase. The place of the 'alien' is at stake: 'We can see . . . that the bringing on stage of that which is . . . alien . . . is at work through the entire opinion'.⁴³ Harlan, we might say, serves as a model for the activity of 'alienation' in Ball's sense – 'the art of placing an action at a distance so that it can be judged objectively and so that it can be seen in relation to the world – or rather, worlds – around it.'

³⁹ *Living Speech* 179 n 12.

⁴⁰ *Ibid* 169.

⁴¹ *Ibid*.

⁴² *Cohen v California* 403 US 15 1971.

Immediately prior to his engagement with Harlan's opinion for the Court, White examines particular aspects of Athenian tragedy. His question is how this genre 'has been seen to express the essential dignity and value of the human being'.⁴⁴ In one passage concerning the theatre's treatment of women, he writes:

In the world of Athens, women had a legal and social position mainly as possessions of men, whether fathers or husbands; even in procreation women were imagined to contribute nothing to the child except a kind of oven in which the male seed could grow; and they themselves had essentially no property and no civil rights. Yet by all three of the great dramatists of Athens they are represented on stage as psychological and moral actors who are in every sense (except power) the equal of men. It may be indeed that such figures as Antigone and her sister, Ismene—and Phaedra, Medea, and Alcestis too—are the most deeply and fully realized women in Western literature until Shakespeare, perhaps even Jane Austen. It is hard to know how to explain this phenomenon fully, but I think it is another expression of the general impulse to put on stage what is real but unseen—a part of life that is normally excluded from the vision of the male citizens who make up most of the audience. . . . This kind of drama is not merely a kind of entertainment, not an item of consumption, but a major public and political event, one of the purposes of which, at the hands of the three great geniuses whose work we have, is educative and transformative, bringing its audience to a new kind of life.⁴⁵

With this passage, White sets his stage for his reading of Harlan's *Cohen* opinion. We can be sure that in bringing the two genres together White seeks to make a composition that is 'educative and transformative, bringing [his] audience to a new kind of life.'

Before turning to White's reading of *Cohen* reading, let us listen to some fragments from Harlan's opinion. He begins by quoting the facts of the case as detailed in the opinion of the Court of Appeal of California. Relevant to White's concern with 'voice' are these facts:

The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. The defendant did not

⁴³ *Living Speech* 183.

⁴⁴ *Ibid* 168-69.

⁴⁵ *Ibid* 173.

make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest.⁴⁶

Whilst the words 'Fuck the Draft' were visible, they may be significantly less objectionable than if actually spoken in a certain aggressive tone *by* someone *to* someone. What distinctions might be made?

In affirming the conviction the Court of Appeal held that 'offensive conduct' means 'behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace,' and that the State had proved this element because, on the facts of this case, '[I]t was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against defendant or attempt to forceably remove his jacket.'⁴⁷ Harlan, speaking for the Court's majority, rejected the ruling:

While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not 'directed to the person of the hearer.' . . . No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction.⁴⁸

The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections. . . . In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And while it may be that one has a more substantial claim to a recognizable privacy interest than walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home. . . . Given the subtlety and complexity of the factors involved, if Cohen's 'speech' was otherwise entitled to constitutional protection, we do not think the fact that some unwilling

⁴⁶ Ibid 16-17.

⁴⁷ Ibid 17.

‘listeners’ in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant’s conduct did in fact object to it . . .⁴⁹

[T]he principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. . . . [W]hile the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another’s lyric.⁵⁰

How are we to judge Justice Harlan? Did he do justice to the parties involved? Immediately before his reading of Harlan’s opinion, White invites his reader to keep the ancient Athenian theatre in mind:

What we call the Supreme Court . . . is a public arena, bound by its own structures and rules, one function of which is to bring certain stories and the problems they present into public attention, not for the sake of entertainment but in some sense for education or enlightenment. . . . Like the ancient theater of Athens, the Court is an institution for the making of shared and public meaning that regularly brings into the circle of public attention events and people and places that are normally overlooked or excluded or just not seen. It does so with the object of complicating and ultimately transforming the expectations—the ways of thinking and talking—that the culture has trained us to bring to whatever kind of issue the Court is deciding. In this way the good opinion, like the Attic theater, resists the language of cliché and slogan and insists upon recognizing the pressure of real and surprising human experience.⁵¹

White here offers an image of the Attic theater and the Supreme Court as being not only parts of a ‘culture’, which is a process that shapes certain ‘expectations’, but also cultural critics, who are involved in ‘transforming’ these expectations. In offering this image, White defines himself as a cultural critic, not the least in making a claim as to

⁴⁸ Ibid 20.

⁴⁹ Ibid 21-22.

⁵⁰ Ibid 25.

⁵¹ Ibid 174-75.

what is 'good' criticism. White is to judge the judges. How are we to go about judging White's performance?

After providing certain facts relating to *Cohen*, White begins his act of cultural cum judicial criticism this way:

The judicial process here brings into a zone of public awareness material that is normally unseen, most obviously and dramatically, and perhaps a bit embarrassingly, in the use of the word 'fuck'—a word that, although known to almost all English speakers, is even today, let alone in 1971, typically used only on certain kinds of occasions, with certain kinds of audiences, and is definitely excluded from most formal discourse, certainly the discourse of the Supreme Court of the United States. Justice Harlan marks the distance between this term and the language of the Supreme Court—and the decorous conversation he seeks to establish with his readers—by the way he recites the facts of the case, not in his own words but in those of the California court: 'On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse in the corridor outside of division 20 of the municipal court wearing a jacket bearing the words "Fuck the Draft" which were plainly visible.' He thus uses the word, but distances himself from it, burying it between two sets of quotation marks, in this way at once confirming and violating the expectation that he would never use such a word in this context. This stimulates in the reader a kind of embarrassed uncertainty, which offers her a direct experience of the substantive question at the center of the case: What should we do about the complex set of feelings, both repressive and liberated, that are triggered by the use of this word in such a place?⁵²

This passage can be connected with Bakhtin's words on 'the word in language'. For Bakhtin, to recall, 'not all words for just anyone submit . . . easily to . . . appropriation, . . . : many words . . . sound foreign in the mouth of the one who appropriated them and who now speaks them; they cannot be assimilated into his context and fall out of it; it is as though they put themselves in quotation marks against the will of the speaker'. Harlan's dance with the F-word can serve to remind us that language is not an entity as our talk about 'it' often suggests but, rather, a form of life that is constantly being transformed as we reconstitute it in our hopefully 'living speech'.

White goes on to draw attention to some aspects of *Cohen* that concern the politics and ethics of 'attention', which is at the heart of his approach to justice:

⁵² Ibid 175.

This case is . . . a piece of the world that the national public would normally never see or think about, brought before it as a way of saying, 'This too is real and requires attention.' To do this puts into question the habits of thought and speech that run through our minds without being aware of it, the slogans and the clichés we carry with us about the war, or protesters, or free speech, or the use of crude talk.

Notice, too, that the imagined world in which this story is placed reaches far in space and time alike. In space, it reaches out to Los Angeles and the county jail, to bring what happens there into the circle of public attention that the Supreme Court defines. As we shall see, it reaches back in time, too, when the Court tries to explain its decision, as it must, in the terms and understandings established by earlier decisions. Everything the Court has ever done is of potential relevance; that inheritance must be examined, thought about, and reorganized into a system of thought that will give appropriate and tolerable meaning to the events before it. . . .

. . . What is happening in the *Cohen* case, from one perspective, is just another event in the long struggle over the meaning of the Vietnam War. But the law cannot think in such terms; it must fashion itself to meet the particularities of the case as these emerge in thought and argument that are themselves shaped by the particularities of prior cases, prior arguments. When the bright light of attention is focused on what we have not seen, or seen clearly, it almost always reveals a complexity and richness of significance that we had missed, this putting in question, among other things, our own prior habits of mind and imagination. It frustrates and educates our expectations. In the *Cohen* case, the larger issue—that of the draft, and the war itself—is, of course, on everybody's mind and the source of deep, sometimes violent, internal national conflict. What the law does here is take a tiny fragment of that larger story, this simple act of protest, and examine it not in the terms of the national political debate—prowar or antiwar—but as a constitutional problem, to be analyzed, argued, and decided in the terms established by this branch of the law. This means, as we shall soon see, that an essential part of the opinion will be a delineation of these terms, an account of the universe of meaning established by the First Amendment and the cases decided under it.⁵³

To the extent that the opinion 'puts into question the habits of thought and speech that run through our minds without being aware of it' we are on the way to achieving a certain healthy disinterestedness in relation to the case. This movement could be

⁵³ Ibid 176-78.

called a 'rise above prejudice', a movement that would seem to be a requirement for a judge to 'be just'.

The passage just quoted, I suggest, has the potential to disturb certain slogans we carry with us about the law. 'Law is politics', for example. Well, yes and no. Of course 'law is politics', but a certain kind of politics that can be distinguished from another. Concerning the Vietnam War: 'What the law does here is take a tiny fragment of that larger story, this simple act of protest, and examine it not in the terms of the national political debate—prowar or antiwar—but as a constitutional problem, to be analyzed, argued, and decided in the terms established by this branch of the law.' We can be sure that the slogan 'law is politics' need not and should not be a conversation-stopper for White. The confident user of the slogan, I suggest, is likely to have a sense of alienation from the world that White does not share.

White goes on to reconnect the *Cohen* case with ancient Greek theater:

Like the drama, then, the opinion brings before us what is remote in time and space and in doing so creates a world of imagination, simultaneously drawn from the world we otherwise know and an alternative to it. The idea in both cases is not to offer the audience an escape into fantasy, but to create an imagined reality that can run against that other imagined reality we call the 'real world,' both to test it and to be tested by it. . . .

. . . [Like] the earliest forms of Greek drama . . . the law works . . . by the opposition of character against character, plaintiff against defendant, each representing a different vision of the world—and of the law—and seeking to establish his or her own as the dominant one. The central legal institution we call the hearing works by a disciplined opposition that is intended to lead—and sometimes does so—to deeper understanding, indeed, to the revelation of central questions theretofore obscured by our ignorance, or by our habits of thought and imagination.⁵⁴

In putting together a fragment of 'the law' with 'the drama', White offers with his own performance of that to which he directs his reader's attention, namely 'a disciplined opposition that is intended to lead . . . to deeper understanding'. In doing so, White can be read as seeking 'create an imagined reality', one that can help his reader make sense of what he means by 'to create an imagined reality'.

⁵⁴ Ibid 178-79.

One feature of Harlan's *Cohen* opinion that White admires is its management of different forms of talk:

One of the striking features of the opinion in *Cohen*, and one of its great merits, is that it acknowledges this fact about itself: the difference between ordinary language and legal language, between Cohen's speech and Harlan's, is not erased or elided, as such differences often are, but made inescapably prominent. This means that in addition to the usual dramatic opposition between the lawyers there is another over tension, between two registers of discourse and between the people who speak in these different ways: between Cohen, wearing his jacket with its blunt-spoken legend in the municipal courthouse, and Justice Harlan, speaking as he does in elaborate and sophisticated legal terms about that event. On one side, we have a the crude and simple phrase, a gesture of contempt and defiance that seems to express the view that nothing else need be said – to claim that this is a wholly adequate response to the issue of policy it addresses, indeed the only proper response. On the other side, we have a mind of great fastidiousness and care, defining, by the way it works through the issues, a set of crucial cultural and social values: the values of learning, of balance and comprehensiveness of mind, of human intelligence, of depth of understanding. Nothing could seemingly be farther from the mind exemplified in this elegant, complex, civilized composition than the kind of crude speech it protects. By creating in his own voice a tone that respects ordinary canons of decency in expression, then incorporating this vulgarity within it, Justice Harlan performs, at the level of the text, just what he says the First Amendment requires of society in places like the courthouse: the toleration of what we normally exclude or suppress.

In this way, while protecting the speech of Cohen, Justice Harlan distances himself from it, defining himself and the Court as different from, indeed opposed to, the values – the sense of self and other, the idea of public thinking and speaking – expressed by it. It is this distance that enables him credibly to say at one point that the tolerance of 'cacophony' required by the First Amendment may be a sign of strength, not weakness, in the society that is capable of it, for he is himself demonstrating the strength and security of his own way of talking in tolerating one that he has defined as cacophonous. This is a message that he does not merely articulate but performs or enacts throughout the whole opinion, for he simultaneously protects Cohen's speech and exemplifies ways of thinking and talking that are, in one sense at least, at the other end of the spectrum. One ought not to imagine from this opinion that one might be well advised to use language like that on Cohen's jacket in

addressing the Supreme Court, or that to display such a jacket in a courtroom might be immune from sanction.

. . . We can see . . . that . . . the bringing on stage of that which is unrecognized or alien or perhaps taboo, is at work through the entire opinion. Harlan brings on this phrase, this moment, not only to protect it but to establish a dramatic tension with it, a tension that validates it as well as tolerates it. One is reminded of Shakespeare's capacity to see the world from every point of view, in this sense to humanize every monster. Even Caliban, the subhuman creature who tries to rape Miranda and destroy Prospero, is given his moments of sympathy, and more than sympathy—of unique and beautiful expression. So here, where there is no monster, but a person speaking crudely but forcefully about a crucial public issue, Harlan can see value in language he would not use.⁵⁵

The imagined world that White creates in his reading of Justice Harlan's *Cohen* opinion reaches far in time, for he makes connections between Harlan's dramatic opinion and the ancient theater of Athens. In doing so, he draws his reader's attention aspects of speech and listening that are commonly overlooked (or, better, underheard). He does so with the object of complicating and ultimately transforming the expectations that our culture has trained us to bring to 'legal' texts. ('This is legal, not humanistic, or literary', says an over-confident voice in my auditory imagination.) White's legal cum cultural criticism resists the language of cliché and slogan ('law is politics') and insists instead upon recognizing the pressure of real and surprising experience. In hearing Harlan in the echo of ancient Greek drama, White invites us to attend to what we may not have heard, or heard sharply, and puts into question our own prior habits of mind and imagination. He offers to educate our expectations. This is the material of an 'alienation', which can be valuable for us and indeed is in many ways necessary for a complete 'human' life. This healthy alienation requires one to construct a certain 'distance' between one and an event. The achievement of this distance is a performing art, which, as White suggests, Harlan has mastered. White's commentary on Harlan in the echo of Athenian drama, by my reading, is a performance of a similar kind. (We might wonder whether White has learned by heart some of Harlan's opinions in order to help develop 'a mind of great fastidiousness and care, defining . . . a set of crucial cultural and social values . . .') The kind of 'deeper understanding' that the hearing

⁵⁵ Ibid 176-184.

can lead to and that has emerged from *Cohen* is the same kind of understanding that White's reading offers.

* * *

Active pursuit of the various movements associated with the experience of 'alienation', including the estrangement of the familiar and the familiarization of the strange, is an important part of the lifeblood of being able to do justice as a judge, in and out of the law. This pursuit is also the lifeblood of a healthy and vital 'transformative constitutionalism', in which 'the people' are able to consciously engage in the general activity that White calls 'the constitution and reconstitution of language, character, and community'.

Analogy

‘What do you lawyers do?’, asks a Socratic philosopher. ‘We, um, ah . . . , let me draw an analogy between us and economists’, comes a reply. Why bother with an analogy? Joseph Vining, a long-time friend and colleague of White’s at the University of Michigan, has addressed that question. In *The Authoritative and the Authoritarian* (1986), after remarking on the limits of the analogy between law and science and on the need to ‘turn elsewhere’, he says:

Now, one might well ask, Why this search for an analogy? Why not say simply what the thing is rather than what it is like and how it compares with other things? We could try to say directly what legal analysis *is*. But any direct approach would slip rapidly into a demonstration. Legal analysis is this, we would say, and run through a course of professional training. Even then we would be only halfway to understanding, because legal analysis would not have been placed in our minds. It would in fact be left at the mercy of the analogies that do lurk there, for nothing in our minds is unplaced, rightly or wrongly.¹

The activity of analogizing may bring to the surface the analogies that we live by without realizing it – the material of a potentially productive alienation from the commonplaces by which we organize our lives (*Alienation).² These analogies can then be judged for their appropriateness and then hopefully controlled in one way or another, not the least for the purpose of becoming more attuned to the conditions of the world and to the place of ourselves and others in it (*Attunement).

* * *

In *An Introduction to Legal Reasoning* (1949), Edward Levi attempts to ‘describe generally the process of legal reasoning in the field of case law and in the

¹ J Vining, *The Authoritative and the Authoritarian* (1986) 27.

² For the claim that analogical reasoning is at the heart of all human thought, see K J Holyoak and P Thagard, *Mental Leaps: Analogy in Creative Thought* (1995).

interpretation of statutes and of the Constitution.’³ He begins by distancing himself from those who present ‘the law’ as an autonomous ‘system of known rules’:

It is important that the mechanism of legal reasoning should not be concealed by its pretense. The pretense is that the law is a system of known rules applied by a judge . . . In an important sense legal rules are never clear, and, if a rule had to be clear before it could be imposed, society would be impossible. The mechanism accepts the differences of view and ambiguities of words. It provides for the participation of the community in resolving ambiguity by providing a forum for the discussion of policy in the gap of ambiguity. On serious controversial questions, it makes it possible to take the first step in the direction of what otherwise would be forbidden ends. The mechanism is indispensable to peace in a community.⁴

Put differently, we might say that the mechanism of legal reasoning resists the mechanistic analogy as a frame for thinking and talking about ‘words’ and their meaning. The organistic analogy is indispensable for addressing the way words mean, for without it, we could not have a transformative constitutionalism worthy of the name.

Levi talks about reasoning by analogy and its relation to the use of precedent. Reasoning ‘from case to case’, he said, ‘is a three-step process in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation.’⁵ These are the steps: ‘similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case.’⁶ In Jack Balkin’s nutshell, ‘the logic of law is to a large degree the logic of similarity and difference.’⁷ Balkin treats the word ‘logic’ as synonymous with ‘rationality’. Some people would suggest or claim that analogical reasoning is not the material of ‘logic’ and ‘rationality’, which are better kept for formal, mechanical reasoning (*Rationality). Balkin outlines this mechanistic form as follows:

³ E H Levi, *An Introduction to Legal Reasoning*, Chicago (1949) 1.

⁴ Ibid.

⁵ Ibid 1-2.

⁶ Ibid 2.

⁷ J M Balkin, ‘Nested Oppositions’ (1990) 99 *Yale Law Journal* 1669, 1671.

The key idea in propositional logic (and Aristotle's syllogistic logic) is that statements like 'Fetuses are Persons' can be translated into symbols that can be manipulated without regard for what they stand for. Thus, one might argue with perfect logical validity that if all *F* are *P*, and if murder is defined as killing a *P*, then killing an *F* is also murder. The formal character of the symbols guarantees that the result is logically valid, regardless of the substantive content of the symbols.⁸

The 'result' may please some self-identified 'pro-life' advocates in the abortion debate, but they may sense that something has been lost in translation. That 'something' may spur some 'pro-choice' advocates to come up with an equally tidy result that comes out the other way.

The 'logic'/'rationality' of law involves basic and inescapable questions of valuation, which cannot be cast in a mechanistic form:

The rationality of similarity and difference . . . is concerned with the conditions under which we can classify things as being *F*'s or *P*'s. Are fetuses enough like the other things we call persons to count as persons? They have DNA, they share certain bodily functions of adult humans, and they are composed of living cells. On the other hand, all these characteristics are true of one's liver or one's appendix. Are fetuses more like persons or more like your appendix? Are *all* fetuses equally like persons, or are some of the things within the category we call 'fetus' more person-like and some more appendix-like, for example fetuses that are eight months old and fetuses that are three weeks old? These types of questions are the object of the rationality of similarity and difference. Here we must patiently compare what things are alike or unlike, to what extent or for what purpose they are alike or unlike, and (most importantly) *why* we want to treat them as alike or unlike.⁹

Such 'rationality' does not offer a method that leads to unique, determinate solutions. We are left with a kaleidoscopic world, in which, as Cass Sunstein said in *On Analogical Reasoning* (1993): 'Everything is a little bit similar to, or different from, everything else.'¹⁰ Put differently: 'Everything is similar in infinite ways to everything else, and also different from everything else in the same number of ways.'¹¹

⁸ Ibid 1673.

⁹ Ibid 1673.

¹⁰ C R Sunstein, 'On Analogical Reasoning' (1993) 106 *Harvard Law Review* 741, 774.

¹¹ Ibid.

What is to become of the basic legal principle that ‘similar cases should be treated similarly’? Differences between people (and within a person) can quickly arise over its application. ‘Similarity’ is not what we might say ‘out there’ in a world of objects, and thus accessible to be seen by all right-thinking people who take the trouble to look hard enough, perhaps aided with ‘proper’ legal training. Each ‘case’ might be said to be at least in some sense different from every other case, but the individual and collective effort to imaginatively create a sense of order leads to the creation of similarity. The creation of similarity given the actuality of difference is commonly the material of talk about justice or injustice. Levi indeed asked this question: ‘When will it be just to treat different cases as though they were the same?’¹² Levi did not explicitly engage with this question – he simply noted that a ‘working legal system must therefore be willing to pick out key similarities and to reason from them to the justice of applying a common classification.’¹³ We might do well to try to augment such ‘justice’ talk.

* * *

The Legal Imagination has seven chapters, each of which is divided into groups of selected readings, commentary, and questions, which lead to writing assignments. The readings include not only case opinions and statutes and legal commentary but also poems, and excerpts from various kinds of works, including novels, philosophical dialogues, plays, treatises, literary criticism, and histories. This diversity may be taken as an invitation to redefine what it means to ‘think like a lawyer’. (What say we play with the phrase ‘imagine like a lawyer’). In some prefatory remarks, White suggests that the act of ‘defining the legal imagination’ is an imaginative act:

As you look at the readings, you will notice that in selecting them I have drawn heavily from my own reading of literature. Of course I hope that others will find this material and the lines of thought to which it gives rise of interest, but my purpose is not to claim that a literary education is the only one for a lawyer or for this course: it is to establish a way of looking at the law from the outside, a way of comparing it with other forms of literary and intellectual activity, a way of defining the legal imagination by comparing it with others. The non-legal

¹² Levi, *op cit*, 3.

¹³ *Ibid.*

readings are meant to give us a common sense (if an incomplete one) of what legal literature leaves out, of what others do that the law does not, and to define a context out of which judgments can begin to be drawn and against which they can be tested. In the notes and questions I bring to both sorts of literature some of the concerns of the literary critic, but I hope I do so in a way that the general reader can easily follow.¹⁴

White here directs his reader's attention to the concern of locatedness: his approach to the law seeks 'to establish a way of looking at the law from the outside' and 'to give us a common sense (if an incomplete one) of what legal literature leaves out'. With this concern with 'a common sense' and for a 'general reader', we can be sure that White is not a systematic philosopher seeking to build a clear and distinct foundation for the pursuit of knowledge that is commonly called 'objective'. We might say that he invites his reader, who may be in pursuit of a certain kind of objectivity, to begin to draw analogies for the purpose of making sense of analogical reasoning in the law. What better way to render the familiar strange and the strange familiar? After doing so, his reader may not aspire to more than the ability to argue or decide legal cases on sound but inarticulate grounds. She may be persuaded that arguing and judging are activities that cannot be completely reduced to analytic terms, for they involve an experience that is inherently inexpressible (*Experience).

At various places in *The Legal Imagination*, White explicitly claims that law involves much more than rules and that law has meanings at many different various levels. In some introductory remarks 'to the student', he says:

I want you to begin this course . . . by trying to imagine as fully as possible how it might be said that law is not a science – at least not the 'social science' some would call it – but an art. And this course is directed to you as an artist. There is no body of rules expressing the art of the lawyer and more than that of the sculptor or painter. You are as free as they, and as responsible for what you do. It is true that one of the mediums of the lawyer's art is rules, and the lawyer must know rules, and the other materials of the law, as the sculptor must know clay and the painter paint and canvas. You must know what they are and how they work, before you can work with them. But what you must ultimately learn is what to do with rules and judicial opinions and all the other forms of expression that are the working stuff of a lawyer's life, just as the sculptor must learn what to do with clay and marble. You

¹⁴ Ibid.

may feel that you are constrained by your material, as indeed you are. But compare the pianist, who is told what notes to play, in what order, how long and how loud; yet art is surely possible there. In asking you to define for the moment the lawyer as writer, to regard yourself in that way, I am asking you not to follow direction and example but to trust and follow your own curiosity; to work out in your imagination various future possibilities for yourself, defined by the real and imagined performances of your mind at its best; and to subject what you discover to criticism and speculation.¹⁵

Here White imaginatively puts his master-word 'imagination' to work – a simple mechanical definition would surely have had an odd ring to it in White's living speech. He exercises his analogical imagination in his invitation to his reader to do likewise. (This invitation offers a challenge for those who would place 'science' and 'art' in opposition.) What might happen if we 'define for the moment the lawyer as writer'? How are we to imagine his request 'to work out in your imagination various future possibilities for yourself'? In entertaining those questions, it seems to me that we will have started an enterprise of the imagination – the analogical imagination, among others (*Imagination).

* * *

Shall we compare 'thinking like a lawyer' to 'thinking like a theologian'? The theologian David Tracy has much to say and suggest about the analogical imagination, especially in his magnum opus *The Analogical Imagination* (1981). What can the lawyer learn from this book? A lawyer who takes both tradition and pluralism seriously may well find the following fragment readily transportable:

A religion like Christianity . . . should be willing to enter into the conversation among the religions which the emerging future of global humanity demands. What will happen to all the traditions, including the Christian, when that conversation begins in earnest only the future will tell. What should not happen, however, seems clear. . . . [T]he all too universal dreams . . . of . . . abstract universalists will not prove the route to follow. Rather the particularity of each tradition will gain in intensity as its own focal meaning becomes clearer to itself and others, as its ordered relationships for the whole come more clearly into analogical view. Each self-identity, in the self-respect of its own particularity, will find itself

¹⁵ *The Legal Imagination* xxxiv-v.

anew by releasing itself to a self-exposure of conversation with the others. That each will be changed by that conversation seems assured. To try to determine what concrete changes will occur before the conversation itself is a matter of literally idle speculation. In the meantime, each thinker can learn anew that the road to true concreteness—the concreteness which is the whole—is through the actual concreteness of each particularity and the deliberate, analogical, concrete conversation of all the traditions on the fundamental religious questions and the classical responses in the religions.

...

For all those who cannot share either the easy answer of a relaxed pluralism or the hard answer of a brittle univocity, the reality of an analogical imagination becomes a live option in our day. That option lives by its belief that the route to the future concreteness of the whole—a truly global humanity—lies through the concreteness of each particularity. That option recognizes that it provides no ready theory by means of which anyone can deduce other options or arrange them in some preferred hierarchical chain of being.

That option recognizes as well that each of us understands each other through analogies to our own experience or not at all. What little, painfully little, I understand the Buddhist notion of compassion, I understand through my own experience of compassion—an experience formed through my concrete involvement in my religious and cultural heritages. I recognize that my focal meaning for compassion is likely to receive a liberating transformation through genuine contact and conversation with the Buddhist traditions. I cannot predict, much less deduce, the results of that conversation in advance. Yet if I have already lived by an analogical imagination within my own religious and cultural heritages, I am much more likely to welcome the demand for further conversation. If I, as a Catholic Christian, have already faced the critique of the Catholic understanding of love as *caritas* by Protestant theologians, if I have actually experienced, in critical conversation, the force of the critiques of suspicion upon all Christian understandings of love as compassion, *agape* or *caritas* in Freud, Marx, Nietzsche, then I should have exited from those conversations transformed. I may, in fact I do find that the Catholic *caritas* understanding of Christian love remains the focussed ideal of my life. Yet I also know that my earlier willingness to try to understand alternative options for understanding love and to try to appropriate their critiques of certain realities in my own focal meaning have subtly transformed, purified and enriched my rootedness in my own *caritas* tradition. With T. S. Eliot, I may even recognize that only after that often heated conversation did I find that the self prior to the conversation had the experience but missed the meaning. Only by analogically reaching out to the hard concreteness of the other and through that expanding conversation to the proleptic

concreteness of the whole, will any of us find that we arrive where we began only to know the place for the first time.

This may seem not only a strange paradox, but a painful destiny to us Westerners, with our engrained belief in the ideal of individuality (all too often corrupted into the hard dogma of individualism or caricatured into the soft doctrine of the narcissist self). Yet it is true: We understand one other through analogies to our own experience and we understand ourselves through our real internal relations to and analogous understandings of the other. We should not really need contemporary historical and social-scientific consciousness to remind us of the truth that every self is a radically social, historical, relational reality, for entry into any genuine conversation should teach us this liberating insight.

... [C]onversation occurs *only* where the conversation partners allow the subject matter to take over. Conversation occurs only when we free ourselves for the common subject matter and free ourselves from the prison of our vaunted individualism

We understand one another, if at all, only through analogy. Who you are I know only by knowing what event, what focal meaning, you actually live by. And that I know only if I too have sensed some analogous guide in my own life. If we converse, it is likely we will both be changed as we focus upon the subject matter itself—the fundamental questions and the classical responses in our tradition. That analogical imagination seems and is a very small thing. And yet it does suffice.

For the analogical imagination, once religiously engaged, can become a clearing wherein we may finally hear each other once again, where we may yet become willing to face the actuality of the not-yet concealed in our present inhumanity in all its darkness—a deepening, encroaching darkness that, even now, even here, discloses the encompassing light always-already with us.¹⁶

With that passage we have a resource for talking about White's comment on 'the readings' in *The Legal Imagination*. Why might White wish 'to establish a way of looking at the law from the outside, a way of comparing it with other forms of literary and intellectual activity, a way of defining the legal imagination by comparing it with others'? One possible response is this: The tradition of the law (or, rather, traditions of the law, for there is not now and never has been one, single legal tradition) will find itself anew by releasing itself to a self-exposure of conversation with the others. Lawyers and judges and economists and poets and others understand each other

¹⁶ D Tracy, *The Analogical Imagination: Christian Theology and the Culture of Pluralism* (1981) 450-55.

through analogies to our own experience, and White's readings seek to facilitate this understanding. Whatever his reader might understand about legal justice, she is provided with materials that may offer a liberating transformation through genuine contact and conversation with the legal traditions. White cannot predict, much less deduce, the results of the conversation in advance. Conversation of the kind that he invites ('transformative') is by definition unpredictable. Such conversation involves creative acts of the analogical imagination, with each party willing to risk her or his self-understanding by facing the claims to attention of the other (*Attention; Conversation). Only by analogically reaching out to the hard concreteness of the other and through that expanding conversation to the proleptic concreteness of the whole, will any of us find that we arrive where we began only to know the place for the first time. When we arrive we will be different than we were. An orchid-lover, for example, may have fallen out of love for them. He may be unable to relate to orchids in quite the same way as before. What that 'way' was may now be impossible to fully articulate, and he may not aspire to do so. He may have different fish to fry. For another example, an economist who promotes a certain image of *Homo economicus* may be inclined to convert his image of *Homo economicus* into someone who is capable of conversing, really conversing – capable, that is, of giving and receiving neighbourly love worthy of the name. That would place the topic of justice at the heart of the discourse, rendering law a good neighbour, not a 'field' to be 'surveyed' with a view to colonization.

* * *

Speaking of economics, Peter Earl's *The Economic Imagination* (1983) provides food-for-thought on the activity of analogizing. Earl works on the 'interface' (an apt metaphor?) of economics and psychology. His work does not conform to certain orthodox ways – his 'behavioural' economics has been classed by an influential economist as 'not scientific . . . but economic poetry, not real economics'.¹⁷ In the opening chapter of *The Economic Imagination*, Earl composes a response to such a standpoint. (Like a lawyer, Earl has imagined what another economist might say in refutation of his position, and prepared to meet it – 'If I say this, he may say that; and

then I . . .') Some details are as follows. (The economics and psychology jargon can be ignored without losing the thread of my commentary.)

Earl's composition is a 'dialogue'.¹⁸ The dialogue is between 'The Critic', who makes claims that encapsulate a likely reaction ('of an orthodox, positivist, neoclassical economist'¹⁹) to Earl's book, and 'The Proponent', who responds like Earl himself would. Part of the way through the dialogue, Critic has this to say:

But your psychological material, for all its jargon, still seems to me to be rather imprecise. A lot of time you speak of people having 'world views' which 'blinker' them and make them behave in particular ways. You claim that there exists a method of mapping a person's world view but I find it difficult to believe that one can really pin down such a fuzzy concept.²⁰

We could get bogged down here by asking questions about the fittingness of the ocular metaphors 'view' and 'blinker' and about what in the world a 'concept' is, but we will save these for another day (*Concepts).

In response, Proponent seeks to persuade Critic that one indeed can map a person's 'world view'. Proponent begins by outlining a 'method' for doing so, one that involves several sets of questions that invite 'our subject to compare and contrast several features related to our particular context.'²¹ Let Proponent get to work with books:

Since we're presently arguing about whether or not *The Economic Imagination* is a contribution to economics, it might be appropriate for us to consider how I might discover your own set of 'economic perspectives'. I would probably start by asking you to describe the likeness and difference you see between, say, this book, Debreu's (1959) *Theory of Value* and Kelly's (1955) *Psychology of Personal Constructs*. If you have only seen and not actually read Kelly's book, this does not matter. You might at least be able to say that, compared with the first two books, Kelly's work is: 'long' (since it runs to two volumes); 'lacking in mathematical notation'; 'older'; and 'heavier'. If you said that Kelly's book was 'about

¹⁷ P E Earl, 'Indeterminacy in the Economics Classroom', in P E Earl and S F Frowen (eds), *Economics as an Art of Thought: Essays in Memory of G. L. S. Shackle* (2000) 38.

¹⁸ P E Earl, *The Economic Imagination: Towards a Behavioural Analysis of Choice* (1983) 4.

¹⁹ Ibid 14.

²⁰ Ibid 16.

²¹ Ibid.

psychology, not economics'. I could then ask you to compare and contrast these two disciplines as best you can. This would bring out other things and dimensions to interrelate. For example, you might talk about 'economics' and 'psychology' in terms of 'science/non-science'; 'what I do for a living'; and so on. . . .

The data obtained by this technique can be arranged as a matrix – the 'things' which have been compared and contrasted on one axis and the dimensions used to describe them on the other. . . . The matrix . . . enables one to see which things you view as similar and the number of dimensions you can use for describing differences between things.²²

Does this talk not resemble 'thinking like a lawyer', at least to the extent of using reasoning by analogy (albeit for making sense of books rather than cases)?

Since every 'thing' is similar and different to every other 'thing' in potentially infinite ways, this technique enables Proponent to work out a sense of a person's 'world view'. For constructed similarities and differences about 'things' in the world arguably tell us as much about the constructor as they do about the world. Speaking generally, Proponent goes on to say: 'Having discovered the dimensions in terms of which a person views the world, one can work out how she will be disposed to see particular things, how she will behave when confronted with them.'²³ Now getting specific and personal (and playful, given the professional fetish of Proponent for increasing her or his capacity to make accurate predictions):

[I]f I discover that you see yourself as both a scientist and an economist, and if the factor analysis reveals that you see 'science' as synonymous with 'formal model-building and testing', I predict that you will not be able to see as an economic scientist someone who comes along and attempts (as I have attempted) to show that henceforth it is important that 'economics' should involve the use of non-mathematical ideas from subjectivist psychology. By challenging your view of economics in this way, that person will by implication, be challenging your view of yourself as a scientist unless you can begin to separate 'science' and 'formal model-building and testing' into genuinely independent constructs. You, in turn, will then attempt to challenge that person's claim to be contributing to economics.²⁴

²² Ibid 16-17.

²³ Ibid 17.

²⁴ Ibid 17.

In my ears, these fragments from Earl's imagined dialogue are a part of his efforts to claim meaning for his own experience of engaging with 'neoclassical economists' who habitually use the word 'science' in a narrow sense and in a mechanistic (a series of propositions) way. (Earl can be said to resemble a good judge to the extent that he is listening out for an inarticulate and unconscious judgment behind what could be a lapse of judgment.) Resistance to Earl's efforts to use 'science' in a broader sense could place him beyond the pale of the community of power: his 'psychological' study is 'not economics'. Earl could counter such a claim by asking, 'Surely what you call "economics" could include more than just a particular variant of "neoclassical economics"?' Earl's next task might well be to keep Critic willing to talk, for the stakes are high.

In line with deliberate efforts to shift out of 'dualistic' thinking, Earl seeks to integrate the 'personal' and the 'academic', as suggested in this remark by Proponent:

At the end of the day, one must have faith in the ability of a theory to serve the ends for which it was designed. One chooses a theory according to some personal criteria and should use it with caution.²⁵

In this appeal to 'faith', Earl's language overlaps the language of 'religion', which is commonly imagined to be the opposite of 'science' and which is one of the ultimate conversation-stoppers. But why should this be? Could not this be an opening for continued play with 'compare and contrast'? Concerning certain forms of economics, for example, could we not talk of, say, 'the gospel of efficiency', or 'the priests of efficiency'?

Earl's 'dialogue' ends with Proponent reclaiming 'science' and talking about the importance of questions:

[I]f we look for alternative explanations and question ourselves continually, we may be less likely to end up proposing unhelpful policies. If that is science, then this book, for all its lack of mathematical precision and empirical work, is a scientific work, and a contribution to knowledge.²⁶

²⁵ Ibid 19.

How might Critic respond? This is left to our own imagination. Might Critic through this dialogue come to sense her (or his) own 'blinkers', and thus experience what we commonly call 'self-discovery'. If so, what kind of experience would this be? Liberating? Disturbing? Both? Whatever the experience, we might say that the 'dialogue' placed her at the edge of composition. This is a place where habitual modes of thought about the world and the self and others in it become unsettled. That is to say, language doesn't connect the self and the world in quite the same way as it did before. A self-conscious imaginative reordering is called for. Such a reordering may well begin with a question such as, 'Shall I compare thee to . . . (*Attunement)?'

One of the first lessons that I learned at law school was this: there are at least two sides to every argument. Another early lesson was this: on one side, certain analogies are invoked, whilst different analogies are invoked on another side. Economics teachers would do well to consider teaching both lessons, not the least to help them attend to unrecognized analogies in themselves and in those with whom they disagree. Earl offers to teach the lessons in *The Economic Imagination*.

Yet another early lesson at law school was this: reasoning by analogy is at the heart of 'thinking like a lawyer'. It seemed to me then that connections can be made: is not reasoning at the heart of 'thinking like an economist', or at least one who seeks to avoid the sanction of exclusion from the discourse of power?

My own experience of reading Earl's 'dialogue' for the first time was liberating in the sense that it helped attune me to some of the inadequacies of the language I was given to speak as an economics student, who had teachers resembling not Proponent but Critic. This language was used as if it functioned like a mirror, reflecting 'reality',²⁶ and like a tool for communicating 'ideas' that can be conveyed from one person to another without loss. Earl's 'dialogue' helped me acquire a stronger sense that this so-called 'scientific' language gave rise to a 'world view' – and thus a 'view' of oneself and of others – that was incomplete and problematic. The 'dialogue' placed me at the edge of composition, wanting a greater capacity to imagine the author of the text, and myself, so as to make possible a just reading.

²⁶ Ibid 20.

²⁷ Here I draw from the language of Richard Rorty. See R Rorty, *Philosophy and the Mirror of Nature* (1979). Rorty, who actively resists 'ocular' metaphors for knowing, is critical of a long tradition of philosophy which principally seeks to 'mirror accurately, in our own Glassy Essence, the universe around us' (357).

Shall we compare Earl's *The Economic Imagination* to White's *The Legal Imagination*? That question, or one like it, may well be a good one for beginning a fruitful conversation on the place of original and creative books in the world of books. Such a 'conversation' is one that takes those conversing to the edge of composition. Both books can serve to take readers to the edge of two vitally important categories in our world: 'economic' and 'legal'. Shall we compare these two books to . . . ?

* * *

'But hang on a minute!', says a doubter, who adds this question: 'What about the other side of the argument concerning the nature and significance of analogies?' Analogical reasoning in law is not universally praised. Richard Posner delivers a scathing criticism in *The Problems of Jurisprudence* (1990). Here is a fragment:

The heart of legal reasoning as conceived by most modern lawyers is reasoning by analogy. This method of practical reason has an impeccable Aristotelian pedigree, but no definite content or integrity; it denotes an unstable class of disparate reasoning methods. This is an important point, not a quibble. With formal logic playing no role in legal reasoning, reasoning by analogy is the principle candidate for a method that will set lawyers apart from everyday reasoners. . . .

. . . I have owned Volvo automobiles (a total of four) since 1963, and I have been generally satisfied with them. I infer from this experience that if I replace my present Volvo with a new one I probably will be satisfied with the new one too. The prior purchases are 'precedents' or 'analogies' that create a certain likelihood that I will be satisfied if I buy another Volvo the next time I am in the market for a car. . . . But common-sense, practical, everyday induction—well illustrated by the inferential procedure of a baby who burns himself on a stove—is a bit low-keyed to be the core of legal reasoning in a sense flattering to the legal profession.

. . . If reasoning by analogy is actually induction, maybe there is something to the nineteenth-century formalists' idea that law is an inductive science. If careful study of court cases revealed that promises were never enforced unless there were both an offer, we would infer a rule or principle, corresponding to a law of nature. However, the forms of science may be present where the spirit is absent. Judges and law professors have a freedom in their inductive procedures that would be highly destructive in science. This is the freedom to reject an observation as normatively unsound. It is as if a scientist could say, 'I know that the

orbit of Mercury is anomalous in Newtonian cosmology, but I shall ignore that ugly fact because it would be nobler if that orbit were different.' Or, 'I shall deem it to be different.' Or, 'I shall change it.' Judges often and law professors always are free to reject anomalous decisions; they are not imperatively required to reconsider their theories in order to accommodate anomalies. The pressure both to theorize and to adjust theory to observations is correspondingly relaxed.

...

The mere assertion of an analogy may . . . have persuasive force in a psychological sense. Metaphors are often persuasive in that sense, and they are a form of analogy. Metaphor is also a form of redescription—an effort to change the way things look—and such efforts are important to intellectual change, including . . . doctrinal change in law. But judges aspire to more than rhetorically effective, emotionally compelling, or even perspective-altering expression—and will not be comforted to be told that much of their reasoning is metaphoric—just as they aspire to more than the ability to decide cases on sound but inarticulable grounds.²⁸

Would Posner be comforted to be told that at various levels his reasoning here is metaphoric (*Metaphor), with 'metaphoric' itself being a metaphor – in its Greek root, *meta* means across and *phor* means carry? Metaphor serves not only 'to change the way things look' but also to *constitute* the way things look in the first place (we need not confine ourselves to the visual metaphor 'look'). Let me paraphrase Levi: It is important that the mechanism of metaphoric reasoning should not be concealed by its pretense. The pretense is that a metaphor is merely an ornament applied by a rhetorician, who we can define in opposition to a theoretician or to a scientist. Posner, I submit, does not do justice to analogical reasoning. His argument lacks integrity, not the least to the extent that he justifies his skepticism with a few thin examples, such as his expectations concerning the activity of buying a Volvo. A more significant example might have involved a disagreement between economists about whether economics is a science. The disagreement could take an intriguing turn, such as one of them saying, 'Shall we compare economic reasoning to legal reasoning?' With such an example we might be beginning to take analogical reasoning seriously.

Let us engage with some of Posner's other work for the purpose of augmenting analogy talk. His *Economic Analysis of Law* (1972) 'is mainly designed for use either as a

textbook in a law school course in economic analysis of law or as a supplementary reading for law students who are interested in finding out what economics may have to add to their understanding of the legal process.’²⁹ The book is ‘written in the conviction that economics is a powerful tool for analyzing a broad range of questions of legal interpretation and policy but that most lawyers . . . have difficulty connecting economic precepts to concrete legal problems.’³⁰ Posner goes on to define economics as ‘the science of human choice in a world in which resources are limited in relation to human wants.’³¹ The foundation of this economics is an assumption: ‘It explores and tests the implications of the assumption that man is a rational maximizer of his ends in life, his satisfactions – what we shall call his ‘self-interest.’³² Posner has no place for the organistic analogy, which can connect us with John Commons’ ‘artificial selection’ (*Activity). This means that the ‘broad range of questions’ addressed by Posner are much less broad than those addressed by Commons (*Questioning). Posner has nothing to say about different ways of doing economics. He does not seek to justify the direction that he seeks to take ‘economics’. He presents his version of economics as if it is the only version of economics.

What about the reader who is not persuaded of the value of the narrow rationality assumption at the core of Posner’s ‘economic’ analysis of law. Posner says this:

The reader may be troubled by what may appear to him to be the severely unrealistic assumptions that underlie economic theory. The notion of a rational self-interested man conjures up the image of the utterly selfish, ruthlessly calculating individual unlike anyone encountered in real life. Economic theory is quite flexible enough to allow for, and to analyze the effects of, altruism. Its normal assumption is no stronger than that most people in most affairs of life are guided by what they conceive to be in their self-interest and that they choose means reasonably (not perfectly) designed to promote it. Although the assumptions of economic theory are to some extent, certainly, oversimplified and unrealistic as descriptions of human behavior, there is abundant evidence that theories derived from those assumptions have considerable power in predicting how people in fact behave.³³

²⁸ R A Posner, *The Problems of Jurisprudence* (1990) 86-92 (footnotes omitted).

²⁹ R A Posner, *Economic Analysis of Law* (1972) x.

³⁰ *Ibid* 1.

³¹ *Ibid*.

³² *Ibid*.

³³ *Ibid* 5.

What about readers who value theories not for the activity of 'predicting how people in fact behave' but for 'understanding' human institutions and for reconstituting them, not the least to reconstitute us? And what about readers who are troubled by Posner's claim that 'altruism' can be taken seriously in these models? After all, complex arguments could be made about the meaning of 'altruism'. Readers wanting more from Posner on those questions will be disappointed.

Much of Posner's book could be a catalyst for some intense verbal disputes. Consider, for example, this fragment on 'the economics of discrimination':

Many people would prefer not to associate with the members of particular racial, religious, or ethnic groups different from their own and would pay a price to indulge their taste. Thus, although there are pecuniary gains to trade between blacks and whites – to blacks working for whites (or vice versa), whites selling houses to blacks, and so forth – much as there are pecuniary gains to trade among nations, by increasing the contact between members of the two races such trade imposes nonpecuniary, but real, costs on those members of either race who dislike association with members of the other race. These costs are analogous to transportation costs in international trade, and like transportation costs, they reduce the amount of trading (and of the association incidental to it.)

What is the impact of reduced exchange on the wealth of the groups involved? Assume that whites do not like to associate with blacks but that blacks are indifferent to the racial identity of those with who they associate. The incomes of many whites will be lower than they would be if they did not have such a taste. They forgo advantageous exchanges: for example, they may refuse to sell houses to blacks who are willing to pay higher prices than white purchasers. The racial preference of the whites will also reduce the incomes of the blacks, by preventing them from making advantageous exchanges with whites. The reduction in the blacks' incomes, will be proportionately greater than the reduction in the whites' incomes, given that, independent of bigotry or discrimination, the economy of the United States is dominated by white people. Because blacks are only a small part of the economy, the number of advantageous exchanges that blacks can make with whites is greater than the number of advantageous transactions that whites can make with blacks. The white sector is so large as to be virtually self-sufficient; the black sector is much smaller and more dependent on trade with the white.³⁴

³⁴ Ibid 294-95.

What might be the impact of Posner's way of imagining the world on first-year law students? What is to become of anyone who starts to talk of racial discrimination as a 'taste'? Will she not come to resemble Posner's image of *Homo economicus*? Is not Posner contributing to the disintegrative transformation of a language? How are we to judge? Posner's 'economics of', we may do well to note, cannot assist us in the activity of judging, for it assumes language is merely a tool for pointing to something, or someone (possibly a fellow cyborg), in the world.

What might be problematic with the 'unrealistic' assumption about language? Economists rarely have much to say about the limits of 'unrealistic assumptions'. John Taylor and Paul Dalziel's textbook *Macroeconomics* (2002) directs their reader's attention to the fact that economic models are 'abstractions, or simplifications, of the real world.'³⁵ 'Do not', they command in their sermon voice, 'be critical of economic models simply because they are simplifications.' Attend to the other 'sciences': 'In every science, models are simplifications of reality. Models are successful if they explain reality reasonably well. If they were not simplifications, then they would be hard to use effectively.'³⁶ Seemingly seeking to stifle any voices of doubt that a student might have with their claim, the authors bring in the map analogy, which is 'employed' by various textbook authors.³⁷ Here is how they introduce the comparison:

To see a good example of a model, open up your street directory. The aim of the directory is to give you the information you need to find the best way to get where you want to go. To give this information, the map simplifies the real world by making assumptions that certain factors can be ignored; for instance, the street directory assumes that the world is flat, or two-dimensional. While the assumption is totally unrealistic, it makes the map easy to read and does not affect what the street map is trying to do. Does the map show each Stop and Give Way sign? Does it show each house? Every tree? Of course not. A street directory showing all of these features would be too detailed to be effective. It would not fit into your glove box, for a start. The test of a good model is whether it works, not whether it is realistic. Like

³⁵ J Taylor and P Dalziel, *Macroeconomics – New Zealand Edition* (2002) 15

³⁶ *Ibid.*

³⁷ For a history and discussion see R S Goldfarb and W B Griffith, 'The "Theory as Map" Analogy and Changes in Assumption Sets in Economics' in E Etzioni and P Lawrence (eds), *Socio-Economics* (1991).

any model, the street directory is a good model if it enables you to understand what you want to understand.³⁸

But where do fledgling economists want to 'go'? When do we know if a model 'works'? What do we want to 'understand'?

As a number of academics from various backgrounds – from the philosophy of science to poetry – have stressed, every analogy or metaphor has limits.³⁹ What are the limits of the 'theory as map' analogy? Taylor and Dalziel do not ask this question, and thus their readers are offered nothing in the way of tensions about what is being presented in the text. How do we know when a model is omitting something important (thereby making the results dubious)?

William Breit's analogy of 'theory as art' offers an alternative to 'theory as a map'.⁴⁰ Engaging with the work of John Kenneth Galbraith and Milton Friedman, Breit asks, 'How can two of the most distinguished social scientists of our time . . . have arrived at such totally conflicting views of economic reality?'⁴¹ This question is not innocent, for he deliberately avoids the more conventional question, 'Is the world out there like the one Friedman describes or is it like the one Galbraith describes?' Breit invites tolerance for and celebration of diversity:

Art critic John Canaday has shown there is no point saying one painter is more correct in his rendering of the world than another painter. He asks us to look at Vermeer's *The Artist in His Studio* and Picasso's *The Studio*. Which one more correctly depicts an artist's studio. The answer is that both are right relative to a system. A design that is right in Picasso's world is wrong in Vermeer's. There is no rightness or wrongness in art outside of an evolving tradition within a school of art. Both Vermeer and Picasso imposed order on reality and thereby created different versions of reality. . . . This is what Galbraith and Friedman have done. Like an artist painting on a canvas, Friedman or Galbraith each works within his own traditions and has his own modes and manners of organizing his material. Each offers a new way of seeing, of organizing experience.⁴²

³⁸ Taylor and Dalziel, op cit, 15.

³⁹ See, for example, M Hesse, *Models and Analogies in Science* (1996) and J Oster, 'Frost's Poetry of Metaphor' in R Faggen (ed), *The Cambridge Companion to Frost* (2001) 155.

⁴⁰ W Breit, 'Galbraith and Friedman: two versions of economic reality' (1984) 7 *Journal of Post Keynesian Economics* 18.

⁴¹ Ibid 20.

⁴² Ibid 23-26.

With such an image of what economists do, Breit implicitly invites us to reframe debates about the issue of realism. The 'real' issue, as Uskali Mäki has suggested, is not about being realistic versus unrealistic but rather the functions of certain kinds and degrees of realism.⁴³ What is to be included and what is to be excluded and why? This puts the attention on the values and purposes of the theorist.

The 'scientific' Posner does not invite such 'personal' attention. He would have us imagine 'the scientific' to be separate from 'the personal'. To accept his way of imagining, I suggest, is to take a step toward disintegration (*Integration).

The cartographer within Posner may be detected in his *Law and Literature* (1988). At the outset, he tells his reader that the book she has in her hand is 'the first to attempt a general survey and evaluation of the field of law and literature'.⁴⁴ (The distancing 'survey'-'field' imagery is suggestive, especially when compared to my 'tuning in', or 'engagement', with White.) The work, he then added, 'seeks to organize, augment, and redirect (hence the slightly combative subtitle) scholarship in the field.'⁴⁵ Concerning the activity of organizing, Posner has this to say:

Law and Literature . . . is a difficult field to organize. This can be seen by comparing it with law and economics, another more established field of interdisciplinary legal studies Law and economics involves the application of economic theory to legal questions. The economic analyst of law proceeds by setting forth the relevant part of economic theory (such as . . . the effect of monopoly on output) and then applying it to a legal problem, such as the . . . regulation of monopolies by means of antitrust law. The analysis may show that the spirit of legal doctrine is economic, or it may provide an argument for why some rule of law should be changed to make the law more efficient. Thus law and economics has a positive and a normative program, both derived from a single theory of human behavior.

The relation between literature and law is less tidy, because there is no central theory of literature that can be taken and applied to a body of law; because there is no central programmatic thrust, whether positive or normative; and because the relation between the

⁴³ U Mäki, 'Reorientating the Assumptions Issue' in R E Backhouse (ed), *New Directions in Economic Methodology* (1994) 236.

⁴⁴ Posner, *Law and Literature: A Misunderstood Relation* (1988) x.

⁴⁵ Ibid.

two fields does not run in just one direction, as the relation between law and economics does – from economics (theory) to law (subject).⁴⁶

Posner's comparison between the 'fields' of 'law and economics' and 'law and literature' is deeply flawed. Perhaps most significantly, he neglects to point out that the law and economics movement is diverse. The 'law and economics' that Posner refers to may be imagined as merely a strand of the Chicago School of Law and Economics. Other schools include Institutional Law and Economics, Public Choice Theory, and Critical Legal Studies, all of which are diverse and multifaceted. Each school may be said to be seeking to offer a certain image of interrelations between legal and economic processes – an image that is sensed quite differently by members of different schools.⁴⁷ Posner says nothing about this Babel, a silence that is far from innocent (*Listening). His inattention to diverse voices may be associated with his preoccupation with a certain kind of 'theory', which he imagines not to be of 'a certain kind' but rather simply Theory. A literary engagement with the word might have set him on some potentially fruitful tracks, including getting in a position to 'tune in' to White's law *as* literature, along with his literature *as* law, not to mention his transformative constitutionalism. Instead, Posner has produced 364 pages of tunnel vision.

⁴⁶ Ibid 1.

⁴⁷ See N Mercurio and S G Medema, *Economics and the Law: From Posner to Post-Modernism* (1997).

Attention

The word 'attention' is commonly used in ordinary life. 'Everyone knows what attention is', said William James in his *Principles of Psychology* (1890).¹ Well, yes and no. That which seems ordinary can often be transformed into the extraordinary when given some attention. Let us attend to some of White's invitations to give particular *attention* to 'attention'.

* * *

We start at the beginning: the opening chapter of *The Legal Imagination*. In a writing assignment 'What Do Different Speakers Want to Know?', White's reader is asked to imagine that 'there has been a stabbing in a barroom brawl'.² One question is this: 'What more does each of the following speakers want to know about this event? . . . (a) the doctor called to the scene; (b) the assailant's priest; (c) the brother of the stabbed man; (d) the lawyer for the defendant'.³ The final part of the assignment is concerned with the activity of 'drawing inferences from speech'⁴ (an activity we 'all' do 'all the time'⁵). White here invites his reader to attend closely to her own writing:

In this course you will be asked to draw inferences from your writing in a double way: first, you will be asked to look at the portion of a paper in which you show a lawyer – yourself? another? – functioning and talking as a lawyer, and to draw what inferences you can about the possibilities of legal life there defined. Then you will be asked to turn to the part of the paper written in your own voice, as an independent mind, and ask how you define yourself there. The ultimate question, of course, is what connection you can establish between these two sorts of performance, these two kinds of writing, these two selves that you define.

¹ W James, *Principles of Psychology* (1890; 1981) 381.

² *The Legal Imagination* 36.

³ *Ibid* (format modified).

⁴ *Ibid*.

⁵ *Ibid* 39.

In a sense the whole rest of the course is devoted to working out these problems. At this stage, perhaps you will find the following questions helpful in figuring out what inferences might be drawn from your writing.

1. Ask of the passage you have written for the lawyer, 'Who talks this way? What voice do I hear? Is this the voice of a person with feelings, for example, or the voice of a machine? Can I see an independent or creative mind at work?'
2. If this were the only evidence you had of what a lawyer does and who he is, would you want to be a lawyer?
3. If you want to say that the inferences drawn from this passage would be misleading or not representative of the lawyer's life, of the life you hope to make for yourself as a lawyer, explain why that is so. Can you rewrite this passage to make it more nearly true to your own experience or hopes?
4. Look at your last passage, written as an independent mind, and ask the same questions: who is speaking here and to whom? How does he define himself and his audience and the relationship between them? Is there any life or interest in this paragraph?
5. Another approach might be to ask of each of the paragraphs you have written, 'Would anyone, given any choice in the matter, want to read this paragraph? Why?' The skeptical question every reader asks of everything (except for a teacher reading term papers) is, 'Why should I pay any attention at all to what this person writes?' How do you as a writer attempt to provide your reader with an answer to that question?⁶

For me, a first reading those questions had an immediate disabling effect on my capacity to write. An internal conversation began about how I should speak. Somewhere in the conversation was this question: How can I avoid sounding like a 'machine'? To that question came this response: 'Why don't I just talk about the internal conversation, for machines don't do that?' To that response came this: 'This internal conversation that is now going on is evidence that "I" am not a single unit but at least "two selves".'

When rereading White's questions a year or so after initially reading them I continued that internal conversation. First: 'Who was that last self speaking?' Later: 'That self is Thinker-Dawson.' Later: 'That self using the label "Thinker-Dawson" is an echo of Wayne Booth's *My Many Selves* (2006).'⁷ Next: 'Do I have some true center of

⁶ Ibid 40-41.

⁷ W C Booth, *My Many Selves: The Quest for a Plausible Harmony* (2006).

my multiple selves, a self that can move toward a plausible harmony?' And: 'Which "I" should speak now and how?'

Would anyone, given any choice in the matter, want to read those responses? Why? Why should you pay any attention at all to them?

Why should we pay any attention to the set of White's questions quoted above? Who talks that way? Can we hear an independent or creative person at work?

In the second chapter of *The Legal Imagination*, offers various materials for working out 'a way to talk' about one's 'relationship with language'.⁸ The materials include an Emily Dickinson poem,⁹ which is reproduced in full here:

The last Night that She lived
It was a Common Night
Except the Dying - this to Us
Made Nature different

We noticed smallest things -
Things overlooked before
By this great light upon our Minds
Italicized - as 'twere.

As We went out and in
Between Her final Room
And Rooms were Those to be alive
Tomorrow were, a Blame

That Others could exist
While She must finish quite
A Jealousy for Her arose
So nearly infinite -

We waited while She passed -
It was a narrow time -
Too jostled were Our Souls to speak
At length the notice came.

⁸ *The Legal Imagination* 81.

She mentioned, and forgot –
 Then lightly as a Reed
 Bent to the Water, struggled scarce –
 Consented, and was dead –

 And We – We placed the Hair –
 And drew the Head erect –
 And then an awful leisure was
 Belief to regulate –

Immediately after the poem White remarks that the poem 'express[es] an experience of learning, and that one function of the writing is to bring the reader to share it.'¹⁰ The experience is one of movement: 'Dickinson moves into a new position from which she must reflect anew.'¹¹ We can take it that White is among the company of those who hear in Dickinson's work a philosopher with a conversation-orientation.¹² Her uncommon ways with capital letters and dashes may well have been linked to her experiments with poetic voice.¹³

The capitalization of 'Common Night', by emphasizing the ordinary aspect of this event, seems to make it Unordinary too, helping to make 'Nature different'. In the third stanza, the capitalization of 'We' seems to set up a tension between (and a distance from) the 'Her' in the next line (and the 'She' in the first line of the poem). The tension seems to be tied up with ownership and control: whose 'Room' are they in? We can feel a shift in ownership and control in the final stanza when we hear not 'Her Hair' but 'the Hair'. In a commentary on the poem, Herbie Butterfield offers these remarks on the dash:

Dickinson's use of the dash rather than the full-stop or the semi-colon . . . is . . . one key to the intensity of her best lyrics. In many instances the dash heightens the significance of a recorded sensation because sensation itself, comprising sense, emotion, intellect and so on,

⁹ Ibid 99. The poem is '1100' in T H Johnson (ed), *The Complete Poems of Emily Dickinson* (1890; 1960).

¹⁰ Ibid 100.

¹¹ Ibid.

¹² C A Taylor, 'Kierkegaard and the Ironic Voices of Emily Dickinson' (1979) 77 *Journal of English and German Philology* 569, 570-1, 577.

¹³ For a discussion of Dickinson's use of the dash, see P Crumbley, *Inflections of the Pen: Dash and Voice in Emily Dickinson* (1997).

does not have full-stops or semi-colons. The dash makes us pause, but does not make a full break from one thought or image to the next. As in the last line . . . 'And We – We placed the Hair –' the dash functions as an interrogative, a sign of the hopelessness of their grief and, from the preceding line, a point of relation between the dead woman and the living: 'Consented, and was dead – / And We – We . . .'. With careful use of dashes Dickinson can strike a mood at the start of a poem which will remain actively in both emotional and syntactic control. Because an early theme isn't punctuated to a firm conclusion with a full-stop or semi-colon, the theme resides through the poem and can give it far greater homogeneity and texture than it would otherwise have. At best, the technique can push poetry closer to a state of music.¹⁴

White's reader may be excused for imagining that in getting 'closer to a state of music' the course is moving away from law. His questions invite connections:

- a. Does any of the legal statements you have read concern itself with an experience of change or learning? Can you perceive or imagine such an experience lying behind these statements?
- b. Another way to put it might be this: the speaker in . . . the poem[] is self-regarding, self-critical – the contemplator becomes the contemplated. Can the same be said of . . . any legal passage you know?
- c. Can you imagine that any legal statement could be thought of as an activity as complex and significant as a poem?¹⁵

Let us briefly respond to (c). In the spirit of trying to estrange the familiar (*Alienation), how about trying to recompose the opening words of the Preamble to the Constitution of the United States (*Voice). 'We – we – the People of the united States'. (Long live Patrick Henry!) After reading Dickinson, we perhaps can never hear the pronoun 'we' in just the same way as before.

A reader of *The Legal Imagination* may well find herself repeatedly revisiting certain questions. Also, she may well find herself attending to the nature of this 'revisiting'. The following passage may serve to prod a reader toward such attention:

¹⁴ R W (Herbie) Butterfield, *Modern American Poetry* (1979), 36.

You have probably noticed that neither the good opinion nor the good poem can be read through once only, that both require reading again and again in light of where they come out. Both must be addressed with the whole mind, both demand all the attention one can give; and one consequence of reading of this sort is not only an increased understanding of what lies outside of oneself, but a change in the reader himself, an expansion of sympathy or an opening of a new capacity to perceive. Good writing in the poem or opinion works directly on its reader and changes him.¹⁶

We might say that 'good writing', at least of the kind found in *The Legal Imagination*, engages its reader in a kind of conversation, part of which is a conversation about the conversation (*Conversation). As the reader changes, she (or he) can reread with the intention of making sense of the changes that have taken place, of the person the text has helped her become. Any 'conclusions', even after several readings, will be tentative, for they can be expected to be revised, just as earlier conclusions were. In this regard there will be a to-and-fro movement 'outside of oneself' and inside. (We could talk about this movement as a potentially valuable alienation from the commonplaces by which a person has organized her or his life.) Making sense of the movement, to speak from my own experience, will 'demand all the attention one can give'. Part of this making sense will require paying attention to the activity that we call 'paying attention'.

* * *

Our nervous systems are continuously being stimulated in many ways. Think, for example, of the words that your eyes can see on the page before you. And what about sound? As I type now I can hear a radio. And with my auditory imagination I can hear myself speaking. Now I smell some food cooking. And I can feel my fingers touching a keyboard. I am now remembering that memories impact on our nervous systems. And so on. Selective attention helps us manage that bloomin', buzzin' confusion, to echo William James. How should we manage our selective attention?

The activity of managing attention could be talked about under the title 'the economics of attention'. Proponents of the 'economics of' movement have seemingly

¹⁵ Ibid.

¹⁶ *The Legal Imagination* 803.

attended to just about every aspect of our lives – abortion, crime, discrimination, law, marriage, reproduction, sin, suicide. The movement, however, pays no attention to attention – the ‘rationality’ at the heart of this economics explicitly eliminates ‘the state of the mind of the chooser’ (*Rationality). After reading White, we might well consider this inattention to be a serious omission for an economics worthy of the name.

An economist who elects to attend to attention processes can expect little or no attention from her orthodox colleagues. Arjo Klammer is one economist on the margins. Let us attend to what he says about attention in *Speaking of Economics* (2007):

The well-known professors ... are flying around the world all the time, attending conferences, giving lectures, advising important people. In the meantime they publish one article after the other. ... They're seeking attention. ... They write, lecture, confer, and advise to get attention. Without that effort, they get none. And without attention, they do not exist as scientists. Attention is the lifeline, the proof of existence, the sine qua non of scientists.

Students are more than pleased to get the attention of their supervisor and finish their dissertation with his or her assistance. I was concerned with the attention of no one other than my supervisor ... After that accomplishment, my dissertation, came my first publication. I still remember receiving the journal – there they were, my own words, all in print! Available to anyone, everyone! What would people say? Not much, as it turned out. Holding my first book for the first time was even more exciting. In *Conversations with Economists* (1983), all my mental work had become concrete, was ready to be read. Very wrongly, it turns out, I imagined myself having made it into the scientific conversation.

Doing a dissertation is one thing, getting published is another, but getting *noticed* is an entirely different ball game. It had not occurred to me that others in the conversation might ignore the book. But how could this not be? I should have realized this before as a reader. A profusion of bookstore shelves, university library stacks, and catalogues of publishers abound with the work of others seeking attention. How is anyone going to notice a particular book or article when there are so many others?¹⁷

With that last question, Klammer offers a point of departure for re-using a key word in economics, namely scarcity. Economists commonly concern themselves with scarcity at the level of inescapable ‘trade-offs’ given ‘limited resources’. Klammer goes on to set

¹⁷ A Klammer, *Speaking of Economics: How to get in the conversation* (2007) 52.

up an uncommon line of inquiry concerning the study of how scarce resources of attention are allocated to the desires of people to be heard.

In doing so, Klammer attends to conversations commonly imagined to be outside of economics. Concerning psychology:

Psychologists . . . try to figure out . . . why we pay attention to some things and overlook or ignore so many other impulses. They are intrigued by the cognitive problems that humans experience. The concept of attention serves to point to the problematic connection between the stimuli that a human organism receives and its mental state. People receive the same stimuli yet one pays attention while another remains as if nothing happened. Why is that?¹⁸

Klammer here may well be trying to make sense of his own experience in economics. His *Conversations with Economists* was a revelation for some people (including myself and some fellow postgraduate students), whilst for others the book seemed to do little more than provide some frivolous nighttime reading. Trying to make sense of these different responses might well help give new meaning to the phrase 'thinking like an economist', for evidently not all economists think the same way, and we might do well to think about why. The new meaning could help transform the tired and worn utterances about what it means to 'think like a lawyer'. (White's *The Legal Imagination* is no small effort to contribute to a transformation.) Perhaps a new phrase, such as 'paying attention like . . .', could help.

The dominant image of *Homo economicus* is that of a calculating machine, which does not toil over the meanings of words. Klammer's reader is imagined differently:

Effort is [an] important condition for attention. We enhance attention when we have made an effort toward it. Effort influences the intensity of attention. Studying a play before going to the theatre, learning about its context, reading the reviews, and so on means seeing so much more of it than seeing it unaware and unprepared. By now I hope you have struggled enough with 'conversation' and 'attention' that you notice their ubiquity without having to put your brain to the task. They are familiar to you, and have gotten your attention.¹⁹

¹⁸ Ibid 53.

¹⁹ Ibid 54.

Having ‘struggled’ with Klammer in order to give him due attention, we may be better prepared for reading what White has to say regarding ‘attention’.

There may dangers associated with all this attention on attention. What is to become of us? This brings us back to the matter of scarcity:

Intense attention is what characterizes the scientific life. . . . This intense attention . . . accounts for the autism of so many scientists. They are self-absorbed – and have to be – in order to fix their attention on their problem, to focus on what is really important in their research, thus earning the well-deserved reputation of being absent-minded. They are too preoccupied to pay attention to the other conversations that are going on around them, rendering them bad company in non-academic settings. A scientist deeply and intensely engaged in, say, ‘evolutionary games’ tends to see all the information that presents itself to her in that light. When her partner talks about the troubles that the kids are having at school, she wants to show that they can be explained with evolutionary game theory. Unfortunately, the partner most likely does not see it the same way, and will think that she is full of her own stuff. And she is. It is a matter of different focus, or being in another attention space.²⁰

Klammer here provides a resource for thinking about why people disagree and how they might come to agree, or at least agree to disagree. Without being aware of it, parties disagreeing may be in a different ‘attention space’. Becoming aware of the possibility of being in different attention spaces could prod the parties to try and tune in to each other’s space. Failure to tune it, arising from an unwillingness or an inability, could be material for talking about injustice.

Klammer’s attention to attention spaces is part of his effort to re-imagine the ordinary activity that we call ‘conversation’:

The conversation is the manifestation of attention. Instead of thinking of attention as something going on in people’s heads, as psychologists like us to do, I suggest we think of attention as a characteristic of the conversation. Ideas have attention only if they are in the conversation. Conversations are thus attention spaces.²¹

²⁰ Ibid 54-55.

²¹ Ibid 55.

That image of conversations as ‘attention spaces’ might not catch the attention of many economists, but lawyers who are self-reflective about what they do may respond positively. If so, they may well do to imagine themselves as caught in a conversation outside the law, one that could be blended with law talk. The conversation that Klammer is participating in may help a lawyer better equip herself for becoming a better lawyer, one who habitually attends to the political economy of attention.

In attending to Klammer’s identification of the multiplicity of ‘attention spaces’ in and out of economics, we may contribute to the cultivation of our own attention capabilities. One’s capacity to give attention to one’s fellow human beings is not a fixed resource. What might become of the common image of *Homo economicus* if we incorporated into her or him this flesh and blood reality? Having asked that question, we might do well to ask this one: Why give any attention to the common image of *Homo economicus*, who cannot pay any real attention to anyone?

* * *

As mentioned in the Introduction to this Thesis, Simone Weil takes attention seriously. My efforts to tune in to the vital place of attention in White’s work have led me to try and catch the drift of Weil’s work. Some remarks are as follows.

In July 1943, a month before the end of her short life, Weil wrote a letter to her parents in which she expressed dissatisfaction with some of her readers:

Darling M., you think I have something to give. That is badly expressed. But I too have a sort of growing inner certainty that there is a deposit of pure gold in me which ought to be passed on. The trouble is that I am more and more convinced by my experience and observation of my contemporaries that there is no one to receive it.

It’s a dense mass. What gets added to it is a piece with the rest. As the mass grows it becomes more and more dense. I can’t parcel it out into little pieces.

It would require an effort to come to terms with it. And making an effort it so tiring!

Some people feel vaguely that there is something there. But the content themselves with uttering a few eulogistic epithets about my intelligence and that completely satisfies their conscience. Then they listen to me or read me with the same fleeting attention they give everything else, taking each little fragment of an idea as it comes along and making a definitive mental decision: ‘I agree with this’, ‘I don’t agree with that’, ‘this is brilliant’, ‘that is

completely mad' They conclude: 'It's very interesting', and then go on to something else. They haven't tired themselves.'²²

Weil, we might say, demands all the attention her reader can give, and this means reading again and again in light of where she comes out. The whole of what she has to say is much more than the sum of 'each little fragment'. We will do well to try to catch not a reified 'idea' but an elusive drift.

Weil was plagued by headaches for a number of years. These no doubt were associated with her efforts to develop a language of pain, key words in which are 'affliction' and 'suffering'. A distinction between 'affliction' and 'suffering' is significant. In '[a]n hour or two of violent pain caused by a decayed tooth' we can experience 'suffering' without experiencing 'affliction'.²³ Weil uses the latter word to name a process that consists of 'an uprooting of life, a more or less attenuated equivalent of death, made irresistibly present to the soul by the attack or immediate apprehension of physical pain.'²⁴ Christ can serve as a model: 'Affliction constrained Christ to implore that he might be spared, to . . . believe he was forsaken by the Father.'²⁵ That Weil would desire to develop a language of pain may be sensed from a letter she wrote in 1942 to the Reverend Father Jean-Marie Perrin:

In 1938 I spent ten days at Solesmes, from Palm Sunday to Easter Tuesday, following all the liturgical services. I was suffering from splitting headaches; each sound hurt me like a blow; by an extreme effort of concentration I was able to rise above this wretched flesh, to leave it to suffer by itself, heaped up in a corner, and to find a pure and perfect joy in the unimaginable beauty of the chanting and the words. This experience enabled me by analogy to get to a better understanding of the possibility of loving divine love in the midst of affliction. It goes without saying that in the course of these services the thought of the Passion of Christ entered into my being once and for all.

There was a young English Catholic there from whom I gained my first idea of the supernatural power of the sacraments because of the truly angelic radiance with which he seemed to be clothed after going to communion. Chance – for I always prefer saying chance rather than Providence – made of him a messenger to me. For he told me of the existence of

²² Reproduced in S Weil, *Lectures on Philosophy* (trans H Price) (1978) 1-2.

²³ S Weil, *Waiting for God* (1951; 1973) 117, 118.

²⁴ *Ibid.*

²⁵ *Ibid* 120.

those English poets of the seventeenth century who are named metaphysical. In reading them later on, I discovered the poem of which I read you what is unfortunately a very inadequate translation. It is called 'Love'. I learned it by heart. Often, at the culminating point of a violent headache, I make myself say it over, concentrating all my attention upon it and clinging with all my soul to the tenderness it enshrines. I used to think I was merely reciting it as a beautiful poem, but without my knowing it the recitation had the virtue of a prayer. It was during one of these recitations that, as I told you, Christ himself came down and took possession of me.²⁶

In an way that runs against the utilitarian philosophy of Jeremy Bentham and others, pain can be a wonderful gift. The experience of pain can offer contradictions and paradoxes that can leave us lost for words, or with familiar words that have lost their meaning.

Everyone knows what pain is. Well, yes and no. . . .

It is in a state of affliction, Weil claimed, that we can learn to 'decreate' parts of the self that obstruct the will of God. Her 'decreation' can be read as a continuation of the phrase in the Lord's prayer 'Thy will be done'²⁷ She hoped that by means of decreation, her own unnecessary wants would cease to get in the way of God's love for the world: 'If only I knew how to disappear there would be a perfect union between God and the earth I tread, the sea I hear . . .'²⁸ This 'I' can be thought of as an 'imperialistic'²⁹ self that an ideal self – perhaps with the aid of the gift of a process of 'affliction' that no person, 'not even a pervert', 'would find attractive'³⁰ – would do well to reconstitute. Weil's sense of a self as a collection of voices, often in disharmony with one another, is a far cry from Bentham's unitary atom in pursuit of pleasure.

Bentham's unitary atom would be totally mystified by the following remarks of Weil's on the nature attention:

Attention is an effort, the greatest of all efforts perhaps, but it is a negative effort. . . . Attention consists of suspending our thought, leaving it detached, empty, and ready to be penetrated by the object; it means holding in our minds, within reach of this thought, but on

²⁶ Ibid 68-9.

²⁷ S Plant, *Simone Weil* (1996) 37.

²⁸ Quoted in Plant, *ibid*.

²⁹ J P Little, 'Simone Weil's Concept of Decreation', in R H Bell (ed), *Simone Weil's Philosophy of Culture: Readings toward a divine humanity* (1993) 25, 30.

a lower level and not in contact with it, the diverse knowledge we have acquired which we are forced to make use of. Our thought should be in relation to all particular and already formulated thoughts, as a man on a mountain who, as he looks forward, sees also below him, without actually looking at them, a great many forests and plains. Above all our thought should be empty, waiting, not seeking anything, but ready to receive in its naked truth the object that is to penetrate it.³¹

We can be sure that Weil would have little respect for the dictum ‘I think, therefore I am’ as a foundational utterance. A better start might be ‘Here I am’, to echo an attentive Abraham.³² Only a plural ‘I’ can attend to her (or his) own attention for the purpose of disciplining and transforming it (whatever ‘it’ may be).

Weil explicitly connects attention to the nontrivial matter of ‘the love of our neighbor’.³³ She directs attention to a biblical story concerned with paying attention:

Christ taught us that the supernatural love of our neighbor is the exchange of compassion and gratitude which happens in a flash between two beings, one possessing and the other deprived of human personality. One of the two is only a little piece of flesh, naked, inert, and bleeding beside a ditch; he is nameless; no one knows anything about him. Those who pass by this thing scarcely notice it, and a few minutes afterward do not even know they saw it. Only one stops and turns his attention toward it. The actions that follow are just the automatic effect of this movement of attention. The attention is creative. But the moment when it is engaged it is a renunciation. This is true, at least, if it is pure. The man accepts to be diminished by concentrating on an expenditure of energy, which will not extend his own power but will only give existence to a being other than himself, who will exist independently of him. Still more, to desire the existence of the other is to transport himself into him by sympathy, and, as a result, to have a share in the state of inert matter which is his.³⁴

I confess to having some trouble in catching Weil’s drift here. I am not confident at all as to what she means by the word ‘renunciation’ and by the words ‘a share in the state

³⁰ S Weil, ‘The Love of God and Affliction’, in G A Panichas (ed), *The Simone Weil Reader* (1977) 439, 462.

³¹ *Waiting for God* 111-12.

³² *Genesis* 22:1. For some suggestive remarks on Abraham’s attentiveness, see M Fishbane, *Sacred Attunement: A Jewish Theology* (2008) 209-10.

³³ *Waiting for God* 139.

³⁴ *Ibid* 146-47.

of inert matter'. But the passage seems to be vitally important, not one to 'pass by'. After all, the passage directly connects with the lawyer's question 'And who is my neighbour?'³⁵ When we attend to that question we may be able to more fully understand what Weil is driving at.

For Weil, 'the first duty of a school is to develop the power of attention in children.'³⁶ The development can and should be a lifelong process. Weil's *Human Personality* (1943) – fragments from this essay are reproduced at the end of the final chapter of White's *Living Speech* – has much to suggest about the 'shoulds' in the law.³⁷ For Weil, 'Nothing . . . is more frightful than to see some poor wretch in the police court stammering before a magistrate who keeps up an elegant flow of witticisms.'³⁸ At the heart of a legal system worthy of respect are judges who have a great capacity for attention. To this end, law schools must help students 'learn to distinguish between two cries'³⁹: 'Why am I being hurt?'⁴⁰ and 'Why has somebody got more than I have?'⁴¹ The first cry should be given privileged status, for when it 'arises from the depth of a human heart . . . there is certainly injustice.'⁴² Weil goes on to say:

Apart from the intelligence, the only human faculty which has an interest in public freedom of expression is that point in the heart which cries out against evil. But as it cannot express itself, freedom is of little use to it. What is first needed is a system of public education capable of providing it, so far as possible, with means of expression; and next, a régime in which the public freedom of expression is characterized not so much by freedom as by attentive silence in which this faint and inept cry can make itself heard; and finally, institutions are needed of a sort which will, so far as possible, put power into the hands of men who are able and anxious to hear and understand it.⁴³

³⁵ M D Coogan (ed), *The New Oxford Annotated Bible* (2001 – 3rd ed) Luke 10: 29. The question should be familiar to a LAWS 101 student at Canterbury, where Lord Atkin's speech in the *Snail's Case* has been taught at the start of the course for many years. See *Donoghue v Stevenson* [1931] AC 562, 580.

³⁶ Quoted in R H Bell, *Simone Weil: The Way of Justice as Compassion* (1998) 153.

³⁷ S Weil, 'Human Personality' (1943) in G A Panichas (ed), *The Simone Weil Reader* (1977) 313.

³⁸ *Ibid* 316.

³⁹ *Ibid* 334.

⁴⁰ *Ibid* 315.

⁴¹ As put by Bell, *op cit*, 118.

⁴² Weil, 'Human Personality' 315.

⁴³ *Ibid* 316.

Weil here, we might say, calls for a distinctive emphasis to be put on the activity that we call ‘thinking like a lawyer’. This emphasis could perhaps be called ‘hearing like a just lawyer’.

Where might we begin training to hear like a just lawyer? What about trying to attend to those who are not being given due attention?

Habitually paying attention to one’s neighbours, Weil stressed,⁴⁴ can enrich the force and quality of this attention.

* * *

‘To the memory of Margaret Morgan (whom I never knew)’. Those words are part of White’s dedication in *Justice as Translation*. In 1837, Edward Prigg and three other Maryland citizens kidnapped Margaret Morgan and forcibly took her and her children over the Pennsylvania state line into Maryland, where she became a slave. In *Justice as Translation* White invites his reader to give some serious attention to Morgan and her circumstances in relation to the law. White also invites his reader to attend to her (or his) ‘attention’ processes. If his reader fails to attend to her attention, she may well do an injustice to White, along with Morgan.

Let us begin to work our way into *Prigg v Pennsylvania*⁴⁵ with some background details. Here is Article IV, section 2, paragraph 3 of the United States Constitution:

No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.⁴⁶

This so-called Fugitive Slave Clause, perhaps needless to say, would be of value to slave-owners who seek to recapture escaped slaves. (I say ‘so-called’ because the composers of the Constitution avoided the word ‘slave’.⁴⁷) The Constitutional

⁴⁴ *Waiting for God* 105.

⁴⁵ *Prigg v Pennsylvania* 41 US (16 Pet) 539 (1842).

⁴⁶ US Const art IV, § 2, cl 3.

⁴⁷ The word ‘slave’, said Roger Sherman in the Constitutional Convention of 1787, was ‘not pleasing to some people’. Quoted in P Finkelman, ‘Sorting Out *Prigg v. Pennsylvania*’ (1993) 24 *Rutgers Law Journal* 605, 613 ‘The Framers, writes Finkelman, ‘understood they were writing a Constitution which protected slavery . . . but realized that openly using the word slave might undermine chances of ratification. In

Convention delegates did not discuss what this clause was supposed to accomplish or how it was to be implemented.⁴⁸

In 1793, Congress passed the Fugitive Slave Act, which identified procedures for the return of runaway slaves. The statute allowed masters or their agents to capture runaways and bring them to any magistrate, state or federal, to request a certificate of removal. Armed with such a certificate, the claimant was then free to take the runaway slave out of the state where he or she was found and back to the claimant's state.⁴⁹

There was disharmony between the Northern and Southern states over the process working out relative rights of masters (or agents) and those claimed to be slaves. The Northern states enacted procedural restrictions on the recapture of slaves, restrictions embodying a presumption of freedom in an attempt to affirm through law the presumption that 'all men are free until proven otherwise by orderly procedures.'⁵⁰ This went against the grain in the Southern states where there was a presumption that all blacks were slaves.

Margaret Morgan was the child of a couple who had been born into slavery. They had been the slaves of a Maryland master named Ashmore. Although he never formally emancipated them, sometime before 1812 Ashmore allowed Margaret's parents to live as free blacks.⁵¹ Thereafter Ashmore 'constantly declared he had set them free.'⁵² Margaret was born after her parents had been informally set free. She married Jerry Morgan, a free black, and in 1832 they moved across the Maryland border to Pennsylvania, where they had several children. These children were free under Pennsylvania law and they did not fit the constitutional definition of fugitive slaves (persons 'escaping into another' state'). Margaret's marriage to Jerry Morgan and her move to Pennsylvania occurred with the apparent acquiescence of Ashmore.

Justice as Translation White notes that 'an argument can be made that [the clause] does not apply to slaves at all but only to indentured servants' (280 n 3).

⁴⁸ Finkelman, *ibid*, 613-14.

⁴⁹ P Finkelman, 'Slavery', in K L Hall (ed), *The Oxford Companion to The Supreme Court of the United States* (1992) 791, 793.

⁵⁰ C L M Eisgruber, 'Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism' (1988) 55 *University of Chicago Law Review* 273, 276.

⁵¹ Finkelman, 'Sorting Out' 610.

⁵² *Ibid*, quoting T C Hambly, *Argument of Mr. Hambly, of York, (PA.) in the Case of Edward Prigg* (1842). Finkelman notes that Supreme Court Reporter Richard Peters 'did not publish . . . parts of Hambly's printed argument' and that '[i]t is possible that Peters, Justice Story, and Chief Justice Taney did not want this information in the official report because it greatly undermines the result in the case' (*ibid* n 22).

Under either Pennsylvania or Maryland law, Margaret may have been legitimately free.⁵³ She may well have considered herself to be free.⁵⁴

Around 1836, Ashmore died and his estate passed to his niece, Margaret Ashmore Bemis. In 1837, Margaret's husband and Edward Prigg and two others went to Pennsylvania to find Morgan and take her back to Maryland. So as to act in accordance with a Pennsylvania statute passed in 1826 ('An Act to give effect to the provisions of the constitution of the United States relative to fugitives from labor, for the protection of free people of color, and to prevent Kidnapping'⁵⁵), the slave-catchers obtained from a Justice of the Peace a warrant to arrest Margaret Morgan as a fugitive slave. Within a few weeks of leaving Maryland, the slave-catchers seized her and her children one night while Jerry Morgan was away. The slave-catchers took her to the same Justice of the Peace, Thomas Henderson, who had issued the warrant. Henderson would preside over proceedings to determine the legitimacy of the slave-catcher's claims.⁵⁶ For unknown reasons, Henderson refused to issue the necessary papers allowing for the Morgan's removal from Pennsylvania.

However, the slave-catchers removed Morgan to Maryland, where a court hearing determined that she was the slave of Margaret Ashmore. The governor of Pennsylvania took the matter up with Maryland officials. Initially, Maryland refused to comply with an extradition requisition. However, negotiation between the two states led to a compromise. Maryland sent Prigg to Pennsylvania for a trial after Pennsylvania officials agreed that in the event of a conviction he would not be incarcerated until after the United States Supreme Court had ruled on the constitutionality of the relevant state and federal laws.

A trial court convicted Prigg of kidnapping under the 1826 statute. The Pennsylvania Supreme Court affirmed the decision. Prigg appealed to the United States Supreme Court. Prigg's attorney argued that Prigg had legally seized Morgan, exercising his right under the Constitution and the Fugitive Slave Act, and that the Pennsylvania statute was in conflict with the federal law and should be struck down. Justice Story spoke for the Court. Here are several fragments:

⁵³ Finkelman, 'Sorting Out' 610-11.

⁵⁴ Ibid 611.

⁵⁵ Ch L, 1826 Pa Laws 150; quoted in Finkelman, *ibid*, 605 n 4.

The plaintiff in error was indicted in the Court of Oyer and Terminer for York County, for having, with force and violence, taken and carried away from that country, to the State of Maryland, a certain negro woman, named Margaret Morgan, with a design and intention of selling and disposing of, and keeping her, as a slave or servant for life, contrary to a statute of Pennsylvania, passed on the 26th of March, 1826.⁵⁷

Historically, it is well known that the object of [the Fugitive Slave Clause] was to secure to the citizens of the slave-holding States the complete right and title of ownership in their slaves, as property, in every State in the Union into which they might escape from the State where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slave-holding States, and indeed was so vital to the preservation of their domestic interests and institutions that it cannot be doubted that it constituted a fundamental article without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles prevalent in the non-slaveholding States, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.⁵⁸

The clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave which no state law or regulation can in anyway qualify, regulate, control, or restrain. The slave is not to be discharged from service or labor in consequence of any state law or regulation. Now certainly, without indulging in any nicety of criticism upon words, it may fairly and reasonably be said that any state law or state regulation which interrupts, limits, delays, or postpones the right of the owner to the immediate possession of the slave and the immediate command of his service and labor operates *pro tanto* a discharge of the slave therefrom. The question can never be how much the slave is discharged from, but whether he is discharged from any, by the natural or necessary operation of state laws or regulations.⁵⁹

[W]e have not the slightest hesitation in holding that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every State of the Union, to seize and recapture his slave whenever he can do it without any breach of the peace or any illegal violence. In this sense and to this extent, this clause of the Constitution may properly be said to execute itself, and to require no aid from legislation, state or national.⁶⁰

⁵⁶ Eisgruber, op cit, 275.

⁵⁷ *Prigg*, op cit, 608.

⁵⁸ *Ibid* 611.

⁵⁹ *Ibid* 612-13.

⁶⁰ *Ibid* 613.

The remaining question is whether the power of legislation upon this subject is exclusive in the National Government or concurrent in the States until it is exercised by Congress. In our opinion, it is exclusive It is scarcely conceivable that the slaveholding States should have been satisfied with leaving to the legislation of the non-slaveholding States a power of regulation, in the absence of that of Congress, which would or might practically amount to a power to destroy the rights of the owner. . . . Surely such a state of things never could have been intended On the other hand, construe the right of legislation as exclusive in Congress, and every evil and every danger vanishes.⁶¹

Upon these grounds, we are of the opinion that the act of Pennsylvania upon which this indictment is founded is unconstitutional and void. It purports to punish as a public offense against that State the very act of seizing and removing a slave by his master which the Constitution of the United States was designed to justify and uphold.⁶²

Who talks this way? What voice do I hear? Is this the voice of a person with feelings . . . ? (Does Story resemble the compassionate Samaritan?) Is there any life or interest in this opinion?

Margaret Morgan is referred to only once in the opinion. Was there not more that Story should have said about her circumstances? What about her children? What about Pennsylvania's rights and duties in regard to protecting its free black citizens from kidnapping?

White's judicial criticism attends to Story's inattention to some fundamental matters of law. A fragment is as follows:

After a brief statement of the facts—itsself of interest because it is so clotted with legalisms as to distance both judge and reader from the human reality of which it speaks—Story moves directly to the fugitive slave clause of the Constitution. . . . Story's method of interpreting the . . . clause . . . is to look through its language for the intention that lies behind it, an intention he sees on the one side as insistence that maximum protection be given to southern slaveowning interests, and on the other as acquiescence in this claim. For him it seems that there has to be an intention lying behind the words and a single, dominating intention at that. His is a universe in which claims to power are absolute and unyielding. Thus in his interpretation of national powers he normally sees the existence of a federal power, whether

⁶¹ Ibid 623-24.

exercised or not, as inconsistent with the exercise of a simultaneous state power. There cannot be harmony; there must be mastery. In the relation between the national and state governments, the mastery lies in the former; in the relation between the southern and northern states, as expressed in the fugitive slave clause, mastery lies with the South.

This way of reading legal texts is inconsistent with the fundamental idea of law on at least two counts: first, as we think of it, law is a way of creating a world that accommodates opposing interests and claims, a world in which distinct voices can be heard. The fugitive slave clause seems in fact to be framed upon exactly that principle, offering neither the South nor the North everything they might want, but creating a text tolerable to both, with the open questions to be resolved by future interpretation. Story's method of reading is incompatible with this conception of law, for it erases the language of the text and with it all attempts to build a more coherent and complex world upon that basis. . . .

Second, Story's method eliminates the aspirational or idealizing element that is essential to what we think of as law: it reduces talk about what 'ought to be' to talk about what 'is,' or what 'was,' thus reducing aspiration to mere will. The ultimate question for him is not what result makes best sense of the instrument as that document was originally composed, but what the South wanted. This is to destroy the ground of authority upon which law rests: the authority that derives not from the power of the person who makes the law but from the character of the law that is made, from the kind of conversation by which it is to become real in the world. Instead of participating in an argumentative or discoursing community that struggles with the questions, what kind of world we ought to have, what the authoritative language ought to mean, we are offered a world in which the only question is what someone wanted. The vice of this opinion is worse than authoritarianism: it is to destroy authority.⁶³

[T]here is in *Prigg* a paradox that we shall see emerge again in *Dredd Scott*, that as the judge tries to turn away from the language to the 'reality' that lies behind it, he finds himself attending not to a reality at all but to a fictive creation of his own mind, of his own time; in this case the image of the united southern states insisting upon this language, meaning it to be read as Story has read it, while the united northern states acquiesce. This is an impossibly simplistic view of the process by which this provision became law, and of its language too; but the apparent desire for the 'real' is all too often in fact a desire for one's own image of things, not for the complex and uncertain body of evidence that actually exists.⁶⁴

⁶² Ibid 625-26.

⁶³ *Justice as Translation* 117 and 120-21.

⁶⁴ Ibid 123.

White's judicial criticism, perhaps needless to say, is written out of his 'ultimate question', namely, Is it just? 'Just' here concerns a certain kind of attention. We can be confident that a judicial opinion 'clotted with legalisms as to distance both judge and reader from the human reality of which it speaks' will have difficulty in providing this attention. For White, the problem with Story's opinion is that it is written out of a different ultimate question. The *Prigg* case, particularly Story's act of 'reducing aspiration to mere will' offers White and his reader food-for-thought on the separation of law and justice. Story's transformative constitutionalism is not of an integrative kind but of a disintegrative kind.

Giving attention to Margaret Morgan, White goes on to integrate 'ought' and 'is':

... I think the proper result in *Prigg* would have been to uphold the Pennsylvania kidnapping statute, in *Dredd Scott* to find the plaintiff a citizen of the United States. In addition I think that the reading of the Constitution in a more lawyerly way would have led to substantial difficulties, emotional and intellectual, with the results reached in these cases — difficulties which the formulations actually employed by the Justices enabled them, and their readers, to avoid. To focus, for example, upon the circumstances of Mrs. Morgan's freeborn child in a way that recognized that he was a person, entitled to freedom but needing his family, would have been to realize that Mrs. Morgan and indeed her unfree children were people too; a realization, which, if articulated with sufficient clarity, would have tended to erode, not the discourse of law, which it would have exemplified, but that part of it which maintained slavery.

Today we have no slavery, but we do have people suffering greatly, victimized greatly, who in the law and elsewhere are talked about in highly distancing and objectifying ways. Real attention to the fundamental character and commitments of legal discourse, by lawyers and judges and others, might help us bring to our collective attention, however reluctantly, the circumstances of the successors of Margaret Morgan and her children — of all races — and prepare us to address them with more responsiveness and responsibility alike.⁶⁵

The *Prigg* case centered on a person who was 'suffering greatly, victimized greatly'. In one way or another, she was crying from the heart, 'Why am I being hurt?' Putting aside the matter of whether some people were getting pleasure from the cry, that which we call 'the law' could have, should have, echoed the cry, in a *hearing* deserving

⁶⁵ Ibid 139-40.

of the name. For White, that legalisms got in the way, silencing Margaret Morgan, meant that in a fundamental sense the law had lost itself, that lawyers had lost themselves – they were doing some activity other than law.

In a review of *Justice as Translation*, Mark Tushnet commented on White's engagement with the *Prigg* case. Here is one fragment:

What about White's claim that 'Story's method eliminates the aspirational or idealizing element' of law? . . . Conceding that the enterprise that the Constitution put in place has an idealizing element, lawyers like Story may well have believed that the idealizing element consisted of the survival of the United States as an ongoing enterprise that achieves the best results over the course of time, even if quite bad results might be in place at any particular moment. Story's emphasis on the concessions to the South is consistent with this view of the Constitution as a whole. As Story saw it, and he seems to have been correct, those concessions were essential to the establishment of the United States, which once in operation could place the people of the Nation on a course leading to the eventual elimination of slavery. Without the concessions, slavery would have been entrenched permanently in the South with no prospect of elimination by the Nation in which the South participated. The idealizing element was the Constitution as a whole, rather than any particular part of it. If Story believed that the Nation could not survive without acceptance of his interpretation of the fugitive slave clause, and if he believed that the survival of the Nation provided the best prospect for the elimination of slavery, then his interpretation of the fugitive slave clause indeed embodied the aspirational element of the law.⁶⁶

Tushnet here directs a great deal of his attention to what 'Story may well have believed' in order to counter White's claim about 'Story's method' as it concerns the law's 'aspirational or idealizing element'. In doing so, by my reading, Tushnet completely fails to attend to White's central claim, namely, 'Story's method of interpreting the . . . clause . . . is to look through its language for the intention that lies behind it'. (Tushnet says nothing about Story's relationship with his language.) That claim of White's is integral to his claim about the absence of 'attention' given to some basic matters, including 'the circumstances of Mrs. Morgan's freeborn child', matters at the heart of what he has to say about 'the aspirational element of law'. Tushnet seems

to me to be completely deaf to what White says about the injustice done to Margaret Morgan. Tushnet fails to hear not only Morgan's cry but also White's claim about the potential 'responsiveness and responsibility' of lawyers to her cry and to others like it.

Tushnet's failure brings to mind Klammer's economics of attention. Intense attention, to rephrase Klammer, may account for the autism of some lawyers. They may be self-absorbed in order to fix their attention on their problem. What is Tushnet's 'problem'?

That last question is asked with some anxiety. Am I suffering from a similar 'problem'? Am I failing to hear Tushnet?

* * *

Gabi Kupfer's *Margaret's Missing Voice* (2000) seems to me to resemble White's engagement with the *Prigg* case. Kupfer presents and talks about two of her poems that are dedicated to the memory of Margaret Morgan. In some preparatory remarks, Kupfer remarks on the activity of reading as it concerns the poet and the legal critic:

The poet uses language that slows us down. We go back to the story, again and again, savoring the image. A good legal critic should also have this function – to be able to build a bridge between what she says and what she means, to crystallize this with words that we hang onto. In reading poetry, we give new meaning and new importance to each word, because we are forced to slow down and digest, line by line, a story that leaves much untold. To treat other texts as if we are in the realm of poetry is to treat them differently – more carefully. To slow down and pay close attention to language is invaluable.⁶⁷

So let's put away the directions of the Speed-Reading Institute. Can we catch not Kupfer's main idea but her drift, her image of reading poetry for the purpose of reading, really reading, legal criticism? Let us pay close attention to her invitation to 'pay close attention'.

After quoting a Hopkins poem that features a 'Margaret', Kupfer writes:

I keep thinking about the Margaret in *Prigg v. Pennsylvania* – Margaret Morgan – the slave who was captured by slave-patrols and sent back to a slave state. The pregnant woman

⁶⁶ M Tushnet, 'Translation as Argument' (1990) 32 *William and Mary Law Review* 105, 117-18.

⁶⁷ G E Kupfer, 'Margaret's Missing Voice: Using Poetry to Explore Untold Stories in the Law' (2000) 21 *Women's Rights Law Reporter* 177, 177.

who, with the hope of having her child born free, runs to a border state, risking her life. The mother who is mentioned only once at the beginning of the opinion. But of Margaret Morgan existed at the beginning of *Prigg*, even if her name was just uttered once, then surely she existed completely. Why did we not learn anything more? Why did we not hear about the baby she was carrying during this critical time? Maybe it is because bringing a softer, more human side to the realities threatens the importance of the law or threatens the judges' oftentimes inhuman responses. Maybe it is because people will not be interested, or possibly too interested in the stories. Maybe it is to protect the readers of these legal words, hundreds of years later – emotion and narrative might force us to overlook hard fact and legal doctrine. But we cannot overlook the fact that we come to read the law with our own baggage, our own histories, and we interpret the stories in the law with these insights. The fact that Margaret Morgan is left out of the opinion is an important insight.⁶⁸

We can be sure that Kupfer and White would have little trouble slipping into each other's attention space. Like White, Kupfer draws our attention to the basic lack of attention given to Morgan in *Prigg*. Like Kupfer, White appreciates the value of attending to 'the fact that we come to read the law with our own baggage', lest we start to assume that we *all* share the same attention space. With such an assumption the slogan 'Law is law' will not be a slogan but a reality, a reality that erases the vital significance of the different realities of others. For Kupfer and White, the law offers a place, the hearing, to negotiate the meaning of different realities. This is a place that can attend to different attention spaces and offers the hope of bringing them together in the name of justice. The hope can readily be dashed when judges fail to realize the possibilities of a hearing, by failing to give voices due attention. In this regard, *Prigg* is a grand failure.

* * *

What might Tushnet have done to get into a position to hear White better? A good place to start could have been reading the opening of *Heracles' Bow*, in which he stresses that his 'attention is focused on the expressive and constitutive life that is the

⁶⁸ Ibid (footnotes omitted).

center of law—in this sense on the ethics of rhetoric'.⁶⁹ In elaborating, White gives some life to the phrase 'thinking like a lawyer':

[A] conception of the law as an art of language and community may help explain why the object of law school is to teach students 'to think as lawyers' rather than merely to teach them 'the rules.' In their practical lives after graduation, what they will be asked to do by their clients, what they will be paid to do, is to act in the poetic and rhetorical way I describe: to bring to bear that materials of the past upon a present question, remaking those materials as they do so, with the idea of creating a new set of relations in the present and the future—relations between the lawyers themselves and the clients, relations between the clients, and so on. It is the moment of silence, when the lawyer must speak, and in speaking make something new out of his or her language and the world, to which our deepest attention should be directed, in the law school and after. And in giving attention to this side of life, we can hope to acquire knowledge of an important kind: not conceptually restatable information—not in that sense theoretical knowledge—but what Wittgenstein would call learning how to investigate our experience and our world and, on that basis, how to go on.⁷⁰

For me, our deepest attention should be directed to where White would have us direct 'our deepest attention': 'the moment of silence'. This moment should be one of attentive silence, lest we miss the cry of someone being hurt, with an injustice possibly being done in the name of the law.

⁶⁹ *Heracles' Bow* xiii.

⁷⁰ *Ibid* xiii-xiv.

Belief

If economics is a science, why do economists so commonly disagree with each other on fundamental issues? That question seems to irritate some economists, who may be expected to downplay disagreement. John Taylor and Paul Dalziel, in their textbook *Macroeconomics* (2002), can be read as doing so:

[T]here is less economic controversy than you may think. Watching economists debate issues on television or reading their opinions in a newspaper or magazine certainly gives the impression that they rarely agree. There are major controversies in economics, and we will examine these controversies in this book. But when people survey economists' beliefs, they find a surprising amount of agreement.¹

What, dare Taylor and Dalziel's reader ask, are 'beliefs'? Might economists disagree on what 'beliefs' are? Are the right 'survey' questions asked? Might economists disagree on what the right questions are? If we ask problematic questions, we get problematic answers.

The word 'belief' is commonly used in ordinary life. Taylor and Dalziel speak as if the meaning of the word is unproblematic. After reading White on 'belief', we might feel inclined to suggest that there may be some significant disagreement on what constitutes belief. Before turning to White, let us listen to some talk about belief.

* * *

In 1986, a conference titled 'The Rhetoric of Economics' took place at Wellesley College. Various presentations came to be published in *The Consequences of Economic Rhetoric* (1988), edited by Klammer, McCloskey and Solow. The editors offer these introductory remarks:

¹ J B Taylor and P Dalziel, *Macroeconomics – New Zealand Edition* (2002) 21.

In the early spring of 1986 about thirty economists, economic journalists, rhetoricians, philosophers, a political scientist, and a literary theorist gathered at Wellesley College for a conference on the Rhetoric of Economics. The composition of the group seemed unusual. Economists and humanists, after all, live in two different cultures and usually do not take each other's scholarly activities seriously. The conference could be an indication that times are changing.

The change is the emergence of new 'conversation' about economics that aspires to displace the dominant, positivistic view. The time is ripe, since positivism is losing its grip on the collective consciousness of economists and others as well. Its claim that 'logic' and 'facts' are the sole standards for the appraisal of economic theories does not appear to do justice to the complex reality in which economists operate. The new conversation attempts to alter our understanding of the reality by calling attention to the discursive aspects of economics, more particularly to its rhetorical forms.

The editors of the volume called the conference to explore the consequences of and to understand the resistance to this new point of view. We considered the participation of philosophers, rhetoricians, and literary theorists alongside economic practitioners to be critical. After all, now that we economists are becoming interested in our language and in our rhetorical devices, we would do well to pay attention to those scholars who have spent their professional lives thinking, writing, and talking about these subjects.²

These economists and others are paying attention to our processes of attention (*Attention). With a shift in the 'collective consciousness of economists', might the dominant image of *Homo economicus* (a calculating machine that does not have shifts in consciousness) shift too? If so, what is to become of the imperialists in the tribe? Might they begin pursuing 'the economics of attention'? Might attention on attention radically transform the 'conversations' that are called 'economics'?

Stanley Fish was among the 'outsiders' invited to the conference. Here are some fragments from his *Comments from Outside Economics*:

In terms of the larger institution of the academy, as opposed to the smaller institution of any one of our disciplines, something remarkable has happened in the past twenty-five years. For one thing, I am now a professor of law, and that is itself a remarkable fact, since, if the truth were told, my qualifications are much smaller than I'd like them to be. Moreover, if

² A Klammer, D N McCloskey, and R M Solow (eds), *The Consequences of Economic Rhetoric* (1988) vii.

twenty-five years ago you had asked a bunch of law professors which of the other disciplines was most likely to provide help for their work and their thinking, I dare say that literary criticism would have been *extremely* low on the list. . . . It is now *very* high.

The turn to literary studies in law is well advanced and truly frightening. In fact, you cannot now pick up an issue of the *Stanford Law Review* or the *USC Law Review* or the *Yale Law Review* without thinking that you've mistakenly picked up *Diacritics* or *Critical Inquiry*: The essays are concerned with the same issues, and they use the now familiar terms from 'advanced' literary theory.

Now this is, as I've already indicated, extremely heartening from a number of perspectives, but I think it holds . . . dangers. One is that you tend to get a valorized, idealized, and therefore idolized, picture of the literary. What we should now be realizing is that 'the literary' is a game like any other. It is not the place in which all the values driven out by modernism now reside; it is not our last best 'hope.' It is just a practice, and therefore it is not a good idea to follow Klammer's recommendation that the speech of economics should be the same as the speech of poetry. Think of this situation: A judge decides at the end of a case to do a literary analysis of the plaintiff's and the defendant's presentations. He finds himself very much taken by the metaphors employed by the defense attorney and equally taken by the sense of sequence and transition in the presentation of the prosecutor. He then declares himself unable to decide on the merits of the two arguments because they are so stylistically impressive and says, 'Let's have lunch.' He will not be a judge for very long – and for *very* good reasons. So I would say, do not, *do not* take into your discourse, if it's working fairly well, anything, anything from literary studies. That's recommendation number one.³

Are we 'very much taken' by Fish's 'recommendation'? Fish, by my reading, does not do justice to Klammer's 'recommendation'. Judging from my reading of Klammer's work on the language of economics (work that includes a review of White's *When Words Lose Their Meaning*⁴), he would not readily accept Fish's claim that 'the literary' is 'just a practice', and certainly not one that is independent of the practice of law and of economics. To say 'do not take into your discourse . . . anything from literary studies' is to assume a sharp distinction between the inside and the outside, a distinction Klammer would resist. I imagine that if Klammer carried his claims over to the situation

³ S Fish, 'Comments From Outside Economics', in A Klammer, D N McCloskey, and R M Solow (eds), *The Consequences of Economic Rhetoric* (1988) 21, 21-22. (Hereafter 'Comments'.)

of the judge, he would say something like the following: 'If a judge does a literary analysis of the two presentations she may more deeply understand the two stories and get a deeper sense of what is at stake for each party. This way, she may be better able to express in his judicial opinion that both parties have been heard. It seems to me that an important ideal that all of us can *hope* for at the end of a day in court is this: the two parties both say, "Win or lose, we feel that we have been heard."⁵ For me, this is the material of meaningful *justice* talk.' In short, Fish would have done well to explore other implications and possibilities of 'Klamer's recommendation'. A fine judicial opinion might, for example, help the conflicting parties better understand each other and enhance their capacities to live with their differences. Klamer, by my reading, suggests that economists would do well to be more attentive to what their words leave out (*Activity), and thus speak in a more integrated way, a way that expresses greater tolerance for ambiguity and inconsistency.

Following White (*Alienation; Integration), we would do well to imagine a great judicial opinion as a great work of literature, one that offers its readers the potentially enriching, educative experience of disorientation, including a movement that troubles the simple distinction between 'external' and internal. I suspect that Klamer would appreciate that what is often called 'the language of economics' is in fact a collection of languages, including a language of judgment, which is familiar to the judge. Economists would do well to be aware of this language and to express this awareness in their talk. In doing so, economists would change themselves and their discipline. And this would, for Klamer, be a sound consequence of a 'rhetorical' turn.

Back to Fish. Let us join him a little later in his comments, at the point when he comes back to Klamer:

The big point in Klamer's presentations came when he complained that, in the context of his seminar, there came a moment when argument meant war, and victory meant slating the opponent. I'm here to tell you, that's right! Argument means war. There's no other way. And I don't care whether you have classrooms in a circle or hang by your toes from the ceiling or take No-Doze – or rather, Let's Doze – every ten minutes to make sure your blood

⁴ A Klamer, 'White's *When Words Lose Their Meaning*' (1990) 7 *Research in the History of Economic Thought and Methodology* 239.

⁵ These words have been uttered to a lawyer by her client. See S Elias, 'Eulogy for the Lord Cooke of Thorndon' (2008) 39 *Victoria University of Wellington Law Review* 1, 6.

pressure doesn't get up too high: Argument *is* war! There are lots of ways to wage war. One of the most exasperating – passive aggressives have it down pat! (I'm an aggressive aggressive myself) – is to *not* appear to be waging war and to rebuke your opponent for waging war. It's a good move, gets *me* every time! But the idea that it's not war is crazy.⁶

How are we to take that passage? Is Fish being serious when he says 'Argument *is* war!' Is he making an 'argument' about the nature of 'argument' that resembles the sophist Thrasymachus' closed 'argument' about justice: Justice is whatever power says it is, and if you disagree with me, then of course I will seek ways of showing you . . . that I am right.⁷ (Fish has been identified as 'the contemporary sophist'.⁸) If Fish is serious, then we will do well to hear another side of the 'argument' about 'argument'. What we have heard from White in regard to his image of law as a 'culture of argument', is another side. Having heard this side, I submit that this kind of argument *is not* a war and that we will do well to make a distinction between war and argument, not the least to try and tune in and do justice to White.

Fish is well known for his 'no consequences' claim in relation to his taking the 'anti-foundationalist' road.⁹ Let us hear the claim from him:

A sentence from Klammer and McCloskey . . . : 'The point is that all conversations are rhetorical, that none can claim to be the Archimedean point from which all others can be levered.' That's the point. My question is what follows the point? My answer is going to be: Nothing follows from the point.

. . . [A]bsolute claims – the claim to an Archimedean position – cannot be avoided. You cannot help believing – and this is going to sound tautological and commonplace – that what you take to be the case is true. No fancy epistemological work is ever going to shake your convictions about what you take to be true. It would only be possible to avoid claiming superiority for your own point of view if you could somehow get to that side of that point of view; it would only possible if you could have either outside or within you something called critical self-consciousness or self-awareness or self-reflexivity, which you could consult as a

⁶ Fish, Comments, 23.

⁷ As put in W Booth, 'Freedom and Interpretation: Bakhtin and the Challenge of Feminist Criticism' (1982) *Critical Inquiry* 45, 76. Fish might be amused to hear a fragment from *Critical Inquiry* used against him in a law thesis.

⁸ S Fish, *There's No Such Thing as Free Speech* (1994) 281.

⁹ S Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) 323.

qualification of, and a caution on, your beliefs. But, of course, it is the very thesis of the rhetorical point of view, or antifoundationalism, that there is no such corrective or qualification available. Therefore, the point of view you hold or, to be more precise, the point of view that holds you will always be for you – appear to you – the right one. Moreover, your point of view, your rhetoric, is not something you can hold at arm's length with a view toward rejecting it or confirming it. Nor can you hold it tentatively or with a certain reserve. This is a mistake made by Stephen Toulmin . . . [H]e says the following: What we have learned is that it is impossible to get outside our biases and prejudices, and therefore when we come to any serious piece of work, what we must do is discount our biases and prejudice so that we can get on with the job in a more responsible way. I will not dot the *i*'s and cross the *t*'s and point out that there could not possibly be any content to the verb *discount* . . . It could not be the case that after having admitted the inescapability and pervasiveness of interpretation, belief, and culture, he can think that our realization of this pervasiveness can be a means of insulating ourselves against it. That is the most common mistake made by everyone who has ever been enamored of the rhetorical or deconstructive or neopragmatic line: to think that because we know that we are in a situation, imbedded, constituted socially, we can use that knowledge to escape the implications of what we now know. I call that error antifoundationalist theory hope.

. . . [T]here are two things that bringing the economists into the conversation won't do. One is the thing feared by the antirhetoricians, the other is the thing hoped for by the prorhetoricians. The first thing a 'rhetoric of economics' won't do is disable us by taking from us our confidence in the arguments we make, the assertions we put forward, the facts we point to. That's the great fear felt by those who are horrified when they hear a Kuhn, or a Rorty, or a McCloskey talk, the fear that if lots of people get persuaded by that talk, no one will any longer have standards, norms, procedures, and so forth. . . . Correctly seen . . . , the thesis that we can never get outside of our beliefs, rather than loosing us from our moorings, tells us that we *cannot* be loosed from our moorings. They think that now that we have discovered that our perceptions, our sense of what is and what is not a fact or a possible course of action, have not been given to us by God or Aristotle or Kant or Chomsky, but rather have been socially and politically produced, we can now use that knowledge somehow to – how shall I say? – 'soften' the way in which we go about asserting and believing. That is antifoundationalist theory hope.¹⁰

¹⁰ Fish, Comments, 23-30.

There is, I think, much that is problematic with Fish's ocular metaphor 'view'. Let us rehear an important line: 'It would only be possible to avoid claiming superiority for your own point of view if you could somehow get to that side of that point of view . . .'. The use of the metaphor echoes the Enlightenment visualist culture, which gives privileged status to a world of 'clearly' 'defined' objects, which, if they are to move, do so in a predictable manner. To talk about knowing with visual metaphors can constitute a step toward objectifying the world, towards separating the knower and the known. (Of all the senses, sight is the most distancing sense.) Fish takes the step and then goes on to talk about 'beliefs' as if they are things. Visual metaphors for knowing are commonly complemented by tactile metaphors.¹¹ The terms 'in' and 'out' are tactilely based, deriving from our sense of our own body. ('The association of visual and tactile . . . is due to the fact that sight and touch are at opposite extremes in the economy of the sensorium and thus make up for each other's grossest deficiencies.'¹²) Notice how Fish talks about 'the point of view you hold or, to be more precise, the point of view that holds you'. Why the sloppy metaphors? Is it possible that one cannot 'hold at arm's length . . . your point of view' for a reason that Fish does not imagine? Is Fish's 'no consequences' claim a simple failure of the imagination on his part? Where is 'imagination' in his vocabulary? As one of his critics has argued ('warred?'), Fish 'has no explanation for how we create new meanings not already shaped by what we believe.'¹³ Fish unimaginatively imagines 'beliefs' as containers. Here we have a significant point of difference from White.

* * *

'*This Book of Starres*' has much to offer for thinking about 'belief' in the context of 'the language of religion'. White suggests that in reading Herbert's poetry, which is concerned with his religious life, 'the modern American reader', who resides 'in a culture that seems to be divided between the secular and religious', will have to confront 'special difficulties' relating to 'the religious language' in which Herbert's poetry is composed. White poses this question: 'how far is it possible to read Herbert's poetry, cast as it is in religious language, and with a theologically defined audience,

¹¹ W J Ong, *Interfaces of the Word: Studies in the Evolution of Consciousness and Culture* (1977) 135.

¹² *Ibid.*

¹³ S L Winter, 'Bull Durham and the Uses of Theory' (1990) 42 *Stanford Law Review* 639, 676.

without ourselves in some sense sharing the beliefs that the language expresses?’¹⁴ In responding to that question, White returns to the travel analogy and talks at some length about what he means by ‘reading’ and ‘belief’:

Think of reading once more by analogy to travel: to read Herbert is like spending a year, say, in Morocco or Bangkok. Having lived that way for a time it becomes part of one’s experience, part of what Kenneth Burke called one’s ‘equipment for life.’ To protect yourself by staying in the Hilton Hotel would be simply to insulate yourself from that experience and to give yourself another, that of hotel life. To engage with a text or a culture means to accept something other, provisionally but really, and this works changes on the self. Suppose, to take the analogy one further stage, that your travels take you to a place where you learn the local language, not only intellectually but actually, by which I mean that you learn to use it to make the gestures, to engage in the practices, that constitute life in that world. Belief is now no longer an issue. Language and practice are things people do, and we have done them: prayed for the gods to bring rain, exorcised a witch, built our house with a barrier at the door to exclude demons, bowed low to a holy man, and so on. To say we disbelieve the meaning of all these things is a somewhat thin remark against the actuality of our conduct and experience, our engagement with a way of imagining the world and ourselves. To speak a language is an important sense to believe it.

What I say is of course not only true of Christian language, or theological language, but of any. The language of the Talmud, for example, to one who has actually engaged in its processes of thought and imagination, will always have a kind of reality that cannot be erased by an assertion of disbelief; the same is true of the language of modern law, or of Homer’s poetry.

Outside the field of religion we are so comfortable with this fact as not even to notice it; but religious belief is such a charged topic for many of us that we want to deny it. Here I want only to say—or to warn—first, that to engage with this poetry is to engage with the language in which it is written, and this requires a momentary acceptance of it, an acceptance that will in some sense live in the mind thereafter, even if one ultimately rejects it wholeheartedly, as disgusting or vile, just as the experience of Morocco or Paris lives in the mind even if it is later rejected. But one cannot reject it while one is reading it, for that is no longer reading. We must engage with the mind and imagination on the terms that it offers us, or not at all; and even if we later reject these terms, our experience of them will nonetheless have been a real one. Second, I want to say that this experience may affect our

¹⁴ Ibid 43.

own sense of what religious belief is in the first place, both for us, in our pluralistic world in which every construction of reality is poised against others, and for Herbert himself.

In speaking of the religious beliefs of other people our habit is often to describe a set of propositions, largely meaningless to us, which they accept as true: that the Old One made man out of an otter and gave him the sea and the land . . . But how much of the life of belief is captured that way? . . .

As theology, and as poetry too, Herbert's verse is not inherently propositional or doctrinal in kind, but an art of language, the meaning of which lies less in the doctrines that underlie it than in the experience the text reflects and creates. To say that the life of poetry is not in statement, but in experience, is of course familiar enough; here it needs to be repeated because when we confront religious poetry we tend to switch modes of thought and think in doctrinal or propositional terms. The second point is perhaps less familiar: that the life of the religion of which Herbert speaks is not doctrinal or propositional either, but experiential. What this means for us is that in participating in the aesthetic experience offered by the poetry one is necessarily engaging in its religious aspect as well. Indeed there is a sense in which one cannot read it well without engaging in the practice of theology. It would be a mistake to try to distance one's self from this fact or to deny it, I think; but to accept it is not free of difficulty, for, as I suggest above, the reader who does participate in this language, on these terms, will actually experience a construction of the world, set of feelings and meanings to, that are religious in character, and this is so even if he or she is inclined to be hostile to religion in general.¹⁵

During re-readings of that passage, my initial sense of what White meant by 'learning to read' had a reality-check, for the familiar word 'read' became strange. The word 'belief' also became strange. I sensed that to ask seemingly reasonable questions such as 'What are Herbert's religious beliefs?' and 'What are one's own beliefs?' are problematic, for the use of words 'religious' and 'beliefs' here may readily commit the user to imagine that they point to some objective entity 'out' there or 'in' here. Sensing that the questions were problematic, I had an 'aha' experience: I had a new appreciation of what a friend had said about a part of her religious conversion, namely, coming to think of 'faith' as a verb, not a noun 'thing', a thing that one either has or not. It seems that we often seem to want the static, the reduced, the confined, and this want manifests itself in a will to noun. A language that emphasized the verb

¹⁵ Ibid 44-5.

instead of the noun would be full of a sense of movement, opening the door to 'conversion'.¹⁶

In *Living Speech*, White talks about his association with Quakers and the practices he participates in with them. After outlining a few of the practices he goes on to give the word 'belief' new life:

Ultimately the belief upon which these practices rests cannot be encapsulated in a phrase, or creed, or any other set of statements. It is not propositional in nature but experiential, a discovery or a commitment. This fits with the history of the word 'belief,' which does not etymologically mean what we often take it to mean, namely an assertion of propositions claiming to utter the truth of what cannot be known, but a form of love: its is cognate with the archaic 'lief,' as in 'I would lief,' and with our word 'love' itself. The sort of belief I am speaking of is not an intellectual or conceptual position but something that lies beneath or beyond all such things: a kind of commitment of the self. The quotation from Simone Weil reflected in the title to this book suggests that there is an inherent connection between love and justice. This connection is I think true of the special kind of love we call belief, namely that it is essential to justice, and justice to it.¹⁷

After reading that passage we may never hear the word 'belief' in quite the same way again. Any suggestion of a 'survey' of 'beliefs' may now have quite an odd ring. The familiar may have been estranged.

White's emphasis on the verb contains seeds (for want of a better metaphor) that may prod us to attend to our relationship with that which we point to with the word 'language'. In *Justice as Translation*, to recall (*Activity), White fittingly turns 'language' into a verb, 'linguaging': 'Instead of thinking of language as a code into which nonlinguistic material is translated . . . we can imagine linguaging as a kind of dance.'¹⁸ (The dynamic metaphor of the dance challenges simplistic in-out orientation with regard to meaning: meaning is not a thing 'in' language but is an experiential process that is both internal and external.) Herbert may have been much of this mind:

¹⁶ In this spirit, might White have done well not to talk about 'religion' as a 'field', which we can either be 'outside' or inside. White himself has been critical of people who define both law and literature with the territorial metaphor of the field, not the least because it invites questions such as 'What can the law learn from the field of literature?' That question commits one to imagining the law as an object – a system of rules.

¹⁷ *Living Speech* 214.

¹⁸ *Justice as Translation* xii.

One way to think of Herbert's effort in these poems, then, is that he is seeking to define a self, and a relation to his inheritance, that will enable him to do something with this language – this story, these images, this way of talking – other than simply reiterating it; to put himself in a position from which he can accept it, even choose it, as an act of his own, rather than feel perpetually subject to compulsion. But to do such a thing a person would somehow have to work one's way out from underneath this language, at least in part, and this is an almost impossible task for someone who is surrounded, as he was, by people and texts that spoke no other way. Herbert's 'somehow' is his poetry.

... What Milton and Herbert in their very different ways do is to use poetry as a way of gaining distance on this set of ways of thinking and imagining the world, so that they may in another sense make it more fully their own; or, perhaps more accurately, come more freely and fully to inhabit the places, and engage in the practices, it defines. For both poets authority in a sense resides not in this most authoritative of discourses, Christian theology, but the art by which they come to terms with it.¹⁹

What White says in that passage may be a helpful resource for our effort to make sense of White's work. One way to think of White's activity of writing about 'learning to read' Herbert is to gain distance on the sets of ways of imagining the law, the languages of the law, so that he may make them more fully his own – a movement that we might imagine as a potentially productive 'alienation' (*Alienation). Similarly, an economist might do well to 'learn to read' Herbert in order to gain distance on the sets of ways of imagining the economy.

In *Living Speech*, a few pages after talking of his Quaker beliefs, White turns to the law, which 'requires belief':

Think of what makes possible the life of the hardworking lawyer: a belief that what he is doing makes sense and has value in itself, as he himself works out the terms of a settlement, say, or a contract for the sale of urban real estate, and as he imagines his fellow lawyers, across the country, doing much the same thing. If he lost that belief, and thought that all he was doing was working for money, or that what he himself said had no meaning beyond the instrumental or manipulative, that would make the life in a deep sense impossible. Without a belief in the real value of the conversation about justice that is at the center of the lawyer's

¹⁹ 'This Book of Starres' 91-2.

life he would be dead at the core. One can imagine a lawyer or a judge suffering a loss of faith almost as easily as one can imagine a priest doing so. In both cases the life led on such terms would become impossible, empty, dead, no longer full of the life and promise that were its essence.²⁰

Shall we compare White on law and belief to . . . ? I can readily imagine Klammer saying something like this: 'Think of what makes possible the life of the hardworking economist: a belief that what he is doing makes sense and has value in itself, as he himself tries . . . Think, for example, of Leonard Rapping . . .' We will come to Rapping later (*Image).

* * *

White's long-time friend and colleague Joseph Vining has similarly contributed to some novel talk about 'belief', especially in *From Newton's Sleep* (1995). His book takes up the activity of rendering strange what 'is taken for granted',²¹ in pursuit of a productive alienation from the commonplaces by which we organize our lives. For me, the most striking of Vining's claims concerns the sort of 'belief' that lawyers and non-lawyers alike have in general. Consider these fragments:

When one asks, 'What do I believe?' one does not have any very special access to one's belief. That one does not have any very special access is why one asks the question 'What do I believe?' — one's own puzzlement, the absence of any direct, conclusive answer coming from within one.²²

The question what the law 'is' is not so very different from the question what we 'are.' We seek ourselves in evidence of ourselves. Little other way is open to us. What we do is evidence of what we believe, despite what we say — or is evidence of the meaning of what we say. But even to begin the search, and necessary to the undertaking, we must presuppose that that is not all there is, that we are flawed, that what we do is flawed and what we say is flawed. Escape from a circle that would have us dying into what merely is, into the material or into history, is the ordinary, daily, constant experience of human existence. Escape from such a circle is nothing arcane or peculiar to law. Are we in essence who we say we are, or

²⁰ *Living Speech* 216-7.

²¹ J Vining, *From Newton's Sleep* (1995) 3.

²² *Ibid* 35.

are we as we are? We are the joinder of both, and both what we say and what we do must be read.²³

Belief is not a 'state' like a configuration of a system—'Ah, I see that system has gone into a state of belief.' It is not a property of a system, a feature of a thing. Belief is not separate from what is believed, nor is what is believed separate from what you—or he or she—believe, or separate from you.²⁴

Where are we to place those words? That question is not so very different from this question: Where are we to place ourselves? In jointly placing the words and ourselves we will have some evidence of what we believe. What is to become of us?

²³ Ibid 128.

²⁴ Ibid 187.

Concepts

Imagine for the moment that you are turning to the beginning of the Introduction to this Thesis, which opens with the following sentence.

This Thesis uses the concept of ‘transformative constitutionalism’ to illuminate some under-appreciated and misunderstood concepts in the work of James Boyd White.

At first glance, that sentence may well seem to you to be readily understandable, causing little or no difficulty. This entry will be a success for me if you come back to the sentence after reading the remainder of entry and find it less understandable.

A distinguishing feature of White’s work is a silence or absence: he does not offer his reader ‘concepts’. Material with which to make some sense of this silence in this regard resides in *Justice as Translation*, where White offers a critical engagement with ‘the language of concepts’.¹ Let us hear what White has to say.

* * *

As a preliminary to his engagement with ‘the language of concepts’, White claims that when ‘we talk about ethics or politics of law we take positions, implicitly or explicitly, on certain large questions about the nature of language and its relation both to culture and to the individual self.’² That affirmation about such talk precedes this movement toward matters of propriety: ‘To ask, “What are the proper expectations to bring to the political and linguistic activities of others?” is to ask also, “What are the proper expectations to bring to what we ourselves say and do?”’³ That question is White’s departure point for talking about concepts. Here are his opening words:

I want to start to work out a line of response to that question by thinking of some of the implications of the word ‘concept’ (and its cognates), especially as it is used in thought and

¹ *Justice as Translation* 22.

² Ibid 25.

³ Ibid.

writing about language, ethics, and politics. I choose this word both because it is a central term in much of our discourse and because it seems for most people to be completely unproblematic, a perfectly natural way to talk. But for me it is problematic in the extreme: it has overtones and implications that I find difficult, and it is these difficulties that I wish to address.

My hope is to identify certain assumptions about language and life that are often associated with this word—assumptions that I think are false or misleading but that can exist, I hasten to add, without its help, and that can also be partly denied or resisted by one who uses the term with appropriate qualifications. I seek to use this word, that is, as a way into certain larger qualities of our culture, certain habits of our own minds that are so firmly fixed that they may easily seem to inhere in the nature of thought itself.⁴

To the extent that the unreflective use of the word 'concept' might be imprisoning our thinking about 'thought', White's 'hope' may be non-trivial. (How might we judge White's habits of hope?)

White immediately goes on to place himself and his reader and to constitute a relation between the two:

In talking about this word and its associations I speak as a local informant about my own language without any claims to knowledge beyond those of my reader, whose language it is also. I do not ask that what I say be taken on faith or authority, but that it be checked against the reader's own experience; and I speak out of the recognition not only that my account of my language may be wrong but that even if it is right it may be not, indeed will not, wholly correspond with the experience of another person, for there is a sense in which all of our languages are different.⁵

White speaks not as an abstract theorist, who takes the view from nowhere, but someone who perhaps resembles a modern anthropologist, who might be thought of as a friend and as a stranger.⁶ Such a person can be expected to turn not 'subjects' into 'objects' but the familiar into the strange. The movement can serve as a stimulating 'experience', to which the friend would have his conversation partner not only attend but also grant 'authority'.

⁴ Ibid 25-26.

⁵ Ibid 26.

⁶ My language draws from H Powdermaker, *Stranger and Friend: The Way of an Anthropologist* (1966).

I'll stop interrupting for a while and let White speak at some length:

This said, let me begin with a statement of my own experience of this part of our language, while recognizing also that it has something of the character of an admission: the admission that as I have read articles, mainly in journals of law and philosophy, but in other fields too, that use the word 'concept' — the 'concept' of law, the 'concept' of right, the 'concept' of equality — I have found myself repeatedly saying that I simply do not know what this word means. I keep wishing that the writer would use another word (like 'word') or just drop the term entirely. It is not my thought that the word 'concept' and all its derivatives should be driven from the language: 'conception' as a word for 'understanding,' as in 'my conception' of law or legal argument or 'my conception' of good teaching, seems to me useful; and I suppose I would use 'concept' in mathematics and perhaps some other similar fields, as in the 'concept of a triangle,' or the 'concept of a carburetor.' And since it is part of my view that writers remake their languages all the time, there is no reason in principle why 'concept' could not be used by one writer or another in a way that is adequately, even beautifully, controlled or qualified.

For all language, not just the language of 'concepts,' has its dangers. All languages threaten to take over the mind and to control its operation, with all that this implies for one's feelings, for one's sense of self, and for the possibilities of meaning in one's actions and relations. The art of all speech, all expression, thus lies in learning to qualify a language while we use it: in finding ways to recognize its omissions, its distortions, its false claims and pretensions, ways to acknowledge other modes of speaking that qualify or undercut it. The art of expression is also the art of talking two ways at once, the art of many-voicedness. So it is with the word 'concept': its more appropriate uses, in science and mathematics say, might remain unchanged, for there perhaps it is properly qualified and controlled by the rest of the relevant discourse; but I think its use in linguistics, law, politics, and so forth, should be more fully and explicitly controlled by arts of qualification, including those of irony, ambiguity, and contrast, than is now usually the case. I am speaking, then, not of necessities but of tendencies, of the forces of a particular mode of speaking seems to generate, the directions it moves us, or what might be called its cultural implications, or the pressures with which our art must come to terms.⁷

To me, White here sounds like a dissenting judge who uses the personal 'I' or 'me' and who offers fragments of her or his own experience. The turn to the personal is not just

⁷ *Justice as Translation* 25-27.

'mere style' but a way of connecting a speaker and a hearer as his equals (*Voice). White defines his reader as a conversational/dialogical partner joining him on a journey exploring social worlds. A feature of writing that Mikhail Bakhtin calls 'dialogic' is that it self-consciously addresses a reader, one who is situated differently than the writer and who is expected to talk back,⁸ not the least because that which we call 'understanding' cannot be perfect. ('Monologic' writing assumes the adequacy of its own talk and thus assumes an objective meaning.) In his book on Fyodor Dostoevsky, Bakhtin invites his reader 'to renounce their old monologic habits so that we might come to feel at home in the new artistic sphere which Dostoevsky discovered'.⁹ White, by my reading, offers a similar invitation so that we might come to feel at home in a world in which 'the language of concepts' talk is rendered strange and unwelcome.

White's 'admission' sounds to me to be in the spirit of the confessional form adopted, in different ways, by Wittgenstein and Augustine.¹⁰ The Latin word *confessio* means something like 'admitting'. The admitting is, in part, an act to make oneself known, to disclose one's identity. 'In confessing', writes Nicholas Rose, in *Governing the Self* (1989), '... through the obligation to produce words that are true to an inner reality, through the self-examination that precedes and accompanies speech, one becomes a subject for oneself. Confession, then, is the diagram of a certain form of subjectification that binds us to others at the very moment we affirm our identity.¹¹ 'This communitarian stuff is pleasant', we might be tempted to say, before adding, 'but let's attend not to the style but to the substance.' But isn't the style integral to the substance?

Let us let White get to the substance, if there is any, of his argument about 'the language of concepts':

⁸ For an outline of 'dialogic' writing and its application to law, see C Hersch, 'Bakhtin and Dialogic Constitutional Interpretation' (1994) 18 *Legal Studies Forum* 33. Hersch connects his work to White's: 'For a striking attempt to think about dialogue and legal interpretation that is neither explicitly Bakhtinian nor postmodernist, see James Boys White, [*When Words Lose Their Meaning*]' (n 8).

⁹ M Bakhtin, *Problems of Dostoevsky's Poetics* (1984) (ed and trans C Emerson) 272.

¹⁰ For a discussion on the place of confession in Wittgenstein's work and on the connections between Wittgenstein and Augustine, see M A Peters, 'Writing the Self: Wittgenstein, Confession, and Pedagogy', in M A Peters, N C Burbules, and P Smeyers (eds), *Showing and Doing: Wittgenstein as a Pedagogical Philosopher* (2008) 131.

¹¹ N Rose, *Governing the Soul: The Shaping of the Private Self* (1989) 240.

The first pressure of the term is to direct attention away from language to something else: to the realm of ideas, to what is in the mind, or to some field of intellectual reality, and in each instance to something that is assumed to exist in a realm apart from language. 'Concepts' are not words; they are the internal or intellectual phenomena that words are thought to label, as markers, or towards which words are thought to point. To talk about concepts is thus to take the step in the direction of talking as if words had no force of their own, as if they were in fact transparent or discardable once the idea or concept is apprehended. On this view, in its extreme form, the function of words is either to identify external phenomena that can be observed without the use of language—that rock, or tree, or person—or to define or clarify concepts, which are also thought to exist outside language and beyond culture.¹²

To 'direct attention away from language' is to direct attention away from that which directs our attention. For one who takes reflexivity seriously, this is a problematic movement. Avoiding the movement will be aided by discarding inapt ocular metaphors for the activity of knowing.

In directing our attention to our attention, White is inviting a switch from what is 'outside' or inside people to what is between them. That is to say, he would have us attend not to entities but to relations, including talk that constitutes relations. Consider, for example, what he says about the scientific among us:

One form of the kind of discourse that talk about concepts invites is definitional, deductive, and empirical in nature, and in this sense fashioned on a certain model of science. In this way of talking, we define our terms on the assumption that they can be reduced to phrases that could substitute for them. Rationality consists of manipulating these definitions in patterns of deductive coherence or hypothetical description that will be tested by reference to extralinguistic phenomena, which will in turn establish whether they are true or false. Rational discourse, so conceived, is propositional in character; and knowledge, whether factual or conceptual, is of necessity propositional too. Propositions are what we reason about and reason with. (Hence all the talk in the philosophy journals about P and P'.) This kind of discourse is structurally coercive, in the sense that the writer seeks to prove something even to an unwilling reader who resists with all his might until forced by factual or logical demonstration to yield. At its center is an image of language as transparent: our talk is about what is 'out there' in the natural or conceptual world, to which it is the function

¹² *Justice as Translation* 28-29.

of language to point. Language obtrudes on our notice only when it is imperfect or fuzzy: in its ideal form it disappears from view entirely.¹³

Those who insist, after working through what they call ‘the basic economic concepts’, that the market works without any coercion on those who participate in it, may well be oblivious to the ‘coercive’ character of their way of talking. Such people may well be irritated if the ocular metaphors for knowing that they live by are resisted.

White immediately goes on to direct attention to the pervasiveness of the C-word:

As I say, this set of assumptions derives from the model of ‘science’ that has so powerfully dominated our intellectual life in this century. But the habit of mind and language I wish to identify is far deeper in our intellectual culture than the disciplines that explicitly model themselves on science, as I think the use of the word ‘concept’ itself reveals. For we see this tendency of mind also when a classicist talks about the Greek ‘concept’ of honor; when an analytic philosopher talks about the ‘concept’ of right; when an anthropologist talks about the Hopi ‘concept’ of time; when a linguist reduces utterances to propositions that have the ‘same,’ ultimately conceptual, meaning to be expressed variously in different languages (or ‘codes’); when a lawyer talks about the ‘concept’ of freedom of speech; when a sociologist or psychologist represents social or psychological ‘types’ as if they correspond with reality; when someone establishes a department in ‘The History of Ideas’; or when a teacher of writing praises a text for the clarity with which it ‘gets its basic concepts across.’ People may of course resist the implications of their usage – by thinking of conceptual variety or change or instability, for example – but this can be done only against the force of the term itself.¹⁴

What White says here about ‘the force of the term itself’ brings to mind Huck Finn’s use of the word ‘nigger’, along with remarks by White, in the *Edge of Meaning*, on this use (*Experience). From the outset of *Huckleberry Finn* the word ‘nigger’ flows easily from Huck’s mouth. Here are some examples in the opening chapters: ‘By-and-by they fetched the niggers in and had prayers, and then everybody was off to bed.’; ‘Miss Watson’s big nigger, named Jim, was setting in the kitchen door . . .’; and ‘Niggers would come miles to hear Jim tell about it, and he was more looked up to than any nigger in that country.’ Referring to the first and third of these examples,

¹³ Ibid 29.

¹⁴ Ibid 29-30.

White says this: '[I]n his choice of words . . . [Huck] unselfconsciously expressing the apparently universal attitude of the white man towards the black in his world. The ease with which he says this . . . expresses the sense that in this world, for this boy, this was the only way to talk.'¹⁵ The ease with which so many people from all walks of life talk so freely about 'concepts' seems to me to express the sense that in their world this is the only way to talk. There are, perhaps needless to say, significant differences between the words 'concept' and 'nigger', but we might do well to attend to similarities, beginning with the fact that both are words that can seriously harm ourselves and others. The harm associated with the use of the word 'concept' may be more fully sensed when we imagine 'style' and 'substance' to be intimately connected. Failure to make the connection can lead to the 'structurally coercive' concept talk that White is at pains to resist, authoritarian speech which demands, implicitly or explicitly, a reader to submit to what is plainly uttered.¹⁶

Let us return to White's engagement with talk about concepts, joining him at the point at which he addresses issues relating to linguistic and cultural imperialism:

The central danger presented by our talk about concepts is that we may find ourselves speaking as if there were no reason why people in different cultures cannot have the same concepts, no reason why different languages cannot express the same concepts. To the part of our mind that works this way, indeed, variety of languages may come to seem mainly a nuisance, a bother to be eliminated, if possible, in the interest of what we conceive as 'more efficient communication.' For implicit in most talk of this sort is the premise or claim that concepts can be wholly restated, and restated in various languages. Underlying this is the assumption that 'communication' occurs not when we speak the same languages—when we understand each other's utterances in the sense that we know how to respond to them—but when we have the same concepts. Although the conceptual world is communicable only *through* language, it is supposed to exist on a plane above and beyond language, which disappears when its task is done.

While the conceptual view is in principle neutral among languages, and would thus concede that the Chinese translation of our concepts could be as accurate as any statement of

¹⁵ *The Edge of Meaning* 32.

¹⁶ 'The authoritative word demands that we acknowledge it, that we make it our own. . . . It is, so to speak, the word of the fathers. . . . It is a prior discourse. It is therefore not a question of choosing it from among other possible discourses that are its equal. It is given (it sounds) in lofty spheres, not those of familiar contact. . . . It . . . demands our unconditional allegiance.' *The Dialogic Imagination* 342-43.

our own, in practice it is imperialistic. On this view of language there is no reason why we should learn any other language, any other habits of thought, than our own. At the practical level there is an implied claim that our own language is or can be a metalanguage, in which all propositions can be uttered, all truths stated. And the sense that our language – whether we mean by this English, or economics, or law – is the language into which all others can be translated presents the dangers of linguistic imperialism familiar to us from the experience of many colonial countries – the imposition, say, of English law on the Hindus or the Burmese or the insistence that all that really needs to be said in Indonesia can be said in Dutch.

One who uses the word ‘concept’ in the way I mean, then, is on his way towards making the error of the bureaucrat who can only imagine the world in the terms of his institution; of the dean who thinks that the merits of any question can be made plain in the language of academic planning, without any shift of mind; of the lawyer who thinks that the world comes in legal categories; It is the error of thinking that one’s own habits of mind and expression are not to be questioned, that they simply define rationality and coherence. One cannot use a language of concepts, after all, to reflect upon and criticize any of the languages that shape one’s mind and world.¹⁷

White here urges a reflexive disposition, which means being self-conscious about our languages and the way they shape the way we ‘imagine the world’. To be self-conscious is to be sensitive to the limits languages, to the fact that the ‘truths’ that they construct are partial ones. This disposition, to be sure, does not come naturally; it must be cultivated by practicing a ‘shift of mind’, by inhabiting different languages, different ‘habits of mind and expression’. White’s attention to ‘habits of mind and expression’ brings to mind John Dewey’s efforts to make sense of ‘the place of habit in conduct’.¹⁸ Dewey spoke of habits as having a complex role in human behaviour. They *both* enable and restrict thought: ‘Habits become negative limits because they are at first positive agencies.’¹⁹ Attention to habits can enable self-development: ‘The more numerous our habits the wider the field of possible observation and foretelling.’²⁰ Also, ‘The more flexible they are, the more refined is perception in its discrimination and the more delicate the presentation evoked by imagination.’²¹ White is much of this mind (*Imagination), and he is critical of ‘the language of concepts’ for

¹⁷ *Justice as Translation* 31-32.

¹⁸ J Dewey, *Human Nature and Conduct* (1922) 13.

¹⁹ *Ibid* 175.

²⁰ *Ibid*.

having no meaningful place for such habits, and thus for the imagination in reconstituting habits.

For White, the lack of such a place is associated with a reductive form of thinking and expression:

Talk about concepts is also intimately, though perhaps not inextricably, tied to dichotomous and linear thinking, to a commitment to a kind of coherence that denies that out terms have shifting and contrasting uses. The most fundamental rule of logic, that of noncontradiction, requires it: Each term in a logical system must be used in such a way that it either is or is not the case that it applies to the world, and, if the system is to be coherent, the word must be used in ways that are at least consistent and preferably identical. This is a struggle for the univocal, for the proposition that is true or false, entailed or not entailed, and it works by propounding questions that must be answered yes or no. This mode of thought is thus not only dichotomous, it is inherently aggressive and defensive, for its claim is to mark out the terrain of truth.

But only one sort of truth. In ordinary language we use our words with richly overlapping, sometimes contrastive ways, and we know that we define our terms partly in the way we use them. The lawyer, for example, can use 'jurisdiction,' 'equity,' or 'common law' in the most radically different ways without confusion. And, more deeply, poets have always known that life cannot be reduced to systems and schemes. It is in fact the point of certain kinds of poetry – the greatest, in my view – to capture assertion and denial at once, to carry the reader to the point where her languages break down. Toleration of ambivalence is an essential ingredient of intellectual, emotional, and political maturity: the capacity to see, with Virgil for example, at once the greatness of Rome and its terrible cost, or, with Wallace Stevens, at once the fictional character of the poetic world and its reality. Our artists repeatedly teach us that the comprising of contrary tendencies, the facing of unresolved tensions, is an essential part of life. This is one reason why the poem or the drama or the novel, or any other piece of living speech, cannot be adequately represented in a paraphrase, which will normally speak with a single voice and with a confidence in its characterization that the poem itself undercuts or qualifies; to the extent that the paraphrase catches the contrasting forces of the poem, its multiplicity of voice and value, it approaches the status of a poem itself.

All this is something of a truism as said of poetry, but I think it is true of philosophy too. One of the great vices of much philosophic talk is the assumption that the texts made by

²¹ Ibid.

Hobbes or Locke or Plato or Aristotle can on this point or that be reduced to an outline of an argument. That of course is not what the writers wrote, by we are terribly tempted—one sees it in student papers and professional essays alike—to reduce intellectual texts to rationalistic outlines. Yet as Plato taught us, and Hobbes certainly knew, all philosophy must in part be about the language in which it is composed, and so too must all law, all history, all linguistics, all criticism. What we know of poetry, that it is not paraphrasable or subject to translation, is true as well of all our texts, formal and informal. Each speech has its own meaning.

Under these circumstances the great task is to train the imagination to bring within its field of attention the language through which it functions. The central difficulty with talk about ‘concepts’ is that it directs attention in just the wrong way, away from language to something that is thought to exist apart from language. And when attention is in fact directed to the problematic character of one particular term, or ‘concept,’ as it sometimes is, the rest of the language used is assumed to be of perfect stability and soundness. Actually all our language, not just certain terms within it, is in constant flux. Our use of it, and our talk about it, should alike reflect this fact.²²

White’s call for a disposition of reflexivity, which is an essential ingredient of ‘maturity’, is a call for the play of ‘multiplicity of voice’, for ‘living speech’. His overall engagement with ‘the language of concepts’ is an excellent example of such speech. His offering of a mix of factual affirmations, argumentative points, autobiography, expressions of hope and invitation, combine to produce a whole which is not merely the parts added together. Much of what he has ‘composed’ would be lost if we sought to reduce his engagement to ‘a paraphrase’, expressed with ‘a single voice’. We can be sure that through his composition White would hope that he has helped carry his reader to ‘the point’ where her or his language of concepts has reached ‘break down’, a collapse of ‘imagination.’ A reader of *The Legal Imagination* will appreciate that this course book was composed with the object of helping his reader equip herself to take on ‘the great task’ – ‘to train the imagination to bring within its field of attention the language through which it functions.’ That task arguably is central to an economics of attention, which should begin with doubt about what the words ‘economics’ and ‘attention’ point to, words that are *words*, not ‘concepts’. Such an economics would

²² *Justice as Translation* 32-33.

offer a difficult life for the economic imperialist, who is defined by her supreme conversation-stopping confidence on the identity of 'economics'.

At the outset of *Justice as Translation* White invites us to read his book as an essay in response to this 'famous sentence' from Wittgenstein's *Philosophical Investigations* (1953): 'To imagine a language means to imagine a form of life.'²³ White's talk on 'the language of concepts' helped bring Wittgenstein's sentence to life for me, the sense of language as a human *activity*. Related to this sense of language, Wittgenstein offered these famous words about the meaning of a word: 'the meaning of a word is its use in the language.'²⁴ White, in his engagement with 'the language of concepts', does give emphasis to 'use' in talking about the meaning of 'concept'. For example, he says at the outset that he is concerned with 'some of the implications of the word "concept" . . . , especially as it is *used* in thought and writing about language, ethics, and politics' (emphasis added). Also, White himself 'seek[s] to *use* this word . . . as a way into certain larger qualities of our culture' (emphasis added). Different uses are associated with different meanings. Perhaps needless to say, 'we know' this already,²⁵ but a gentle reminder of the kind White offers should surely be warmly welcome, given the powerful ocularcentric forces (including visual metaphors for imagining language) in our culture, forces that can lead us to forget what 'we know'.

As to 'truth', the 'sort of truth' White pursues in writing about concepts is not that associated with 'monologism, which pretends to possess a ready-made truth' but a knowledge that 'is born between people collectively searching for truth, in the process of their dialogic interaction.'²⁶

* * *

Speaking of Wittgenstein, let us leave White behind and attempt to 'go on' (*Activity). Let us critically engage with a committed user of the C-word. We perhaps cannot do better than Richard Posner, a leader of economic imperialism.

²³ Ibid ix. The quotation can be found in § 19 of Wittgenstein's *Philosophical Investigations*.

²⁴ Ibid § 43.

²⁵ To repeat from the last passage quoted: 'The lawyer . . . can use "jurisdiction" . . . in the most radically different ways without confusion.'

²⁶ Bakhtin, *The Dialogic Imagination* 110.

Posner's *Economic Analysis of Law* (1972; 1992) opens with a section titled 'Fundamental Concepts'.²⁷ Here we are introduced to 'the concept of man as a rational maximizer of his self-interest'.²⁸ This requires learning about 'the concept of utility'.²⁹ And so on, and so on. In *Economics of Justice* (1981) we hear about 'the concept of efficiency', which is claimed to be 'an adequate concept of justice'.³⁰ He goes on to apply these 'concepts' to various aspects of life, including, 'primitive law', 'retribution and related concepts of punishment', 'privacy', and 'discrimination'. Listen to what he says on racial discrimination:

In an unregulated competitive market, there are economic forces working to minimize discrimination. In a market of many sellers, the intensity of prejudice against blacks can be expected to vary considerably. Some sellers will have only a mild prejudice and so will not forgo as many advantageous transactions with blacks as their more prejudiced competitors. The costs of these sellers will therefore be lower, which will enable them to increase their share of the market. The least prejudiced sellers will come to dominate the market in much the same way as people who are least afraid of heights come to dominate occupations that require working at heights; they demand a smaller premium for working at such a job.³¹

What troubles me here is not so much what Posner says but what he does not go on to say by way of qualification or modification, which could bring into play quite a different voice from the 'cold' and detached one we have just heard. Posner's wholehearted and heartless commitment to noiseless 'concepts' leaves no room for the expression of a different voice.

Let me put aside issues relating to Posner's perpetuation of the simplistic use of the white/black binary opposition. All 'markets' in the 'real' world are 'regulated' in various ways, at least in the sense that the state has worked out rules and rights with regard to relative capacities and constraints of participants. These capacities and constraints determine, for example, who gets to be in a position to be a 'seller', and thus to count as a 'cost' to someone. One does not have to be Nelson Mandela to readily imagine a situation emerging in which 'blacks' come to control the state and

²⁷ R A Posner, *Economic Analysis of Law* (1972; 1992) 3.

²⁸ Ibid 4.

²⁹ Ibid, n 6.

³⁰ R A Posner, *Economics of Justice* (1981) 6.

³¹ Ibid 352.

then 'blacks' who 'come to dominate the market'. What is to become of the 'concept' of the invisible hand?

Posner's commitment to noiseless concepts can be readily heard in *Law and Literature* (1988). Listen to this talk about the practice of deconstruction (let me add bold-face to give added force to a bold voice):

Deconstruction is at once the most skeptical of critical methods and the one least well understood by lawyers . . . The key to a proper understanding of it is to distinguish between the theory and the literary practice of deconstruction. The theory can be understood only against the background of orthodox language theory . . . Greatly simplified, the orthodox theory holds that we create from our perceptions **concepts** (for example, the **concept** of the tree that stands in front of my house) that are outside of time and space and also distinct from the perceptions out of which they are made; the **concept** of the tree in front of my house exists independently of the particular angles and distances from which I have seen it. At first that **concept** is imprisoned in my mind. If I want to share it with another person I have to encode it in some physical form ('signifier') – a writing, a sound, a gesture, or whatever. Upon hearing or seeing the signifier, the other person will recreate the same **concept** in his own mind.

The orthodox theorist realizes, of course, that the process of conveying the **concept** in my mind to another person's mind may break down; the communication channel is not free of 'noise.' For one thing, the link between signifier and signified is a matter of convention, and conventions are not universal. A tree is *tree* in English, *arbor* in Latin, *Baum* in German. Sometimes a language lacks a signifier for a particular signified. English, for example, lacks words for the **concepts** that lie behind such Greek words as *polis*, *basileus*, and *tyrannos*; the English words by which they are usually translated, 'city,' 'king,' and 'tyrant,' signify other concepts in our culture. So translation is often problematic. . . .

Orthodox language theory regards all these impediments to perfect conceptual transfer, or 'intersubjectivity,' as impurities or corruptions that normal, if not always, can be overcome. And this is the point against which deconstruction mounts its theoretical assault: it insists that to regard those properties of signifiers that impede communication as secondary is arbitrary and culture-bound rather than, as the orthodox theorists suppose, logical or 'natural.' . . . The practitioner of deconstruction may take an ostensibly serious prose passage and immediately get hung up on the first word, which may be an unintended pun or a homonym or a false cognate or may contain a subordinate meaning (perhaps deeply buried in its root) at war with the surface meaning. . . .

Much indeed is lost in clarity of communication when we move from spoken to written speech. Inflection, for example, is lost . . . But to say that the properties of signifiers that make them an imperfect medium of communication are as interesting or important as communication . . . is not to say that communication or 'intersubjectivity' is impossible and hence that no text can be interpreted in a way that will recreate in the reader's mind the (approximate) **concept** that the author of the text meant to convey. Therefore it is not apparent why deconstruction should be thought to disestablish the interpretability of statutory and constitutional texts; nor have Jacques Derrida's self-appointed representatives in the American legal community given any reason why it should. But since literature is not concerned simply with conveying **concepts** in the most economical manner possible (in contrast, say, to an 'executive summary'), one can see how deconstruction might have applications to literary criticism. The use of figurative language, rhyme, assonance, meter, fiction, parable, punning, the arrangement of words on a page (as in poetry), and other devices that call attention to the signifiers and thus decrease the transparency of the medium of communication marks literature as a mode of discourse that seems to exemplify the deconstructionists' program of placing the properties of language that impede communication on a par with the properties that enable it.

. . . It is just too obvious . . . that a work of literature is doing something more than conveying to the reader a paraphrasable meaning conceived in the author's mind. For most critics, however, that something more is a depiction of or commentary on some aspect of reality, such as love or war; and this makes literature 'referential' – there are not just signifiers, there are things signified. . . . [I]f literature is self-referential, the practitioner of deconstruction can indeed regard the subject of literature as being the problematics of reading for meaning. . . . [The] sense – so central to deconstruction – that words live a life of their own, an unruly life that, is also precociously conveyed by T. S. Elliot in Part V of *Burnt Norton*, the first of the *Four Quartets*:

. . . Words Strain
 Crack and sometimes break, under the burden,
 Under the tension, slip, slide, perish,
 Decay with imprecision, will not stay in place,
 Will not stay still . . .

The relevance of all this for law is obscure. . . . If (as I doubt) [Derrida] thinks that no writing ever conveys a **concept** in approximately the form intended by the author, he is, if not barmy, then simply too remote from the legal culture to be heeded.³²

‘The key to a proper understanding of it . . .’ The word ‘it’ in that sentence sounds ominous to me. Is not the word the beginning of an I-It relationship, to be expressed not in a conversation but in a concept-laden lecture, the material of another I-It relationship? Is not Posner’s ‘it’ the beginning of an injustice?

Concerning that which Posner points to with the words ‘the communication channel’, ‘of course, . . . the process of conveying the concept in my mind to another person’s mind may break down’, for some gadfly may offer an admission such as this: *I have found myself repeatedly saying that I simply do not know what this word ‘concept’ means. I keep wishing that you would use another word, (like ‘word’) or just drop the term entirely.* That admission would open the way for Posner to exercise his analogical imagination (*Analogy), which would involve a turn to his ‘experience’ for the purpose of talking about the meaning of the word *to him*. This turn to the experiential could potentially begin a conversation worthy of the name, a conversation that could release the imprisoned C-word from its single meaning in Posner’s mind. During the conversation the gadfly might even ask about the word ‘mind’. What does that word point to? Should we not try and emphasize the verb, and talk about ‘minding’? If we talk about ‘minding’, then we might be less inclined to use the metaphor of ‘conveying’, a metaphor that Posner might do well to dance with, and not just in the interests of a polyphonic style but with the aim of producing some substance ‘in the most economical manner possible.’ This substance might re-mind us what ‘is just to obvious’, namely ‘that a work of literature is doing something more than conveying to the reader a paraphrasable meaning conceived in the author’s mind’. It seems that we need re-minding and re-minding, for we are inclined to forget. Such is the power of habitual modes of thought in our ‘literate’ culture. If we can ‘overcome’ these forces in our culture, aided with a training in ear reading (*Listening), we might sense how we can connect T S Eliot’s words about ‘Words’ to ‘law’, which is not a noun thing, but a literary activity (*Activity).

³² R A Posner, *Law and Literature: A Misunderstood Relation* 211-15

Constitution

On 7-8 April 2000, I attended, as a 'Young Invitee', a conference entitled 'Building the Constitution', held at the Legislative Council Chamber, Parliament Buildings, Wellington. The aim of the conference, as stated at the beginning of the volume that came out of it, was 'to bring together representatives of all points of view in the developing debate on the constitution and to point to a way forward on the debate.'¹ Forty-seven papers were prepared for ten sessions that had diverse headings such as 'The Constitution and Independent Nationhood', 'What Constitutes Our Nation: How Do We Express Ourselves', 'Globalisation and Constitutional Development', 'The Treaty in the Constitution', and 'Multiculturalism and the Constitution'. By the end of the conference, the participants had been exposed to a wide range of meanings that could be given to the word 'constitution'. It may have been helpful for us at the outset of the conference if the organizers had circulated the definitions in the *Oxford English Dictionary*. A collection of these definitions are as follows:

1. The action of constituting, making, establishing, etc.: see the verb.
2. The action of decreeing or ordaining.
3. A decree, ordinance, law, regulation; usually, one made by a superior authority, civil or ecclesiastical; *spec.* in *Rom. Law*, an enactment made by the emperor.
4. The way in which anything is constituted or made up; the arrangement or combination of its parts or elements, as determining its nature and character; make, frame, composition.
5. Physical nature or character of the body in regard to healthiness, strength, vitality, etc.
6. The mode in which a state is constituted or organized; especially, as to the location of the sovereign power, as a *monarchical*, *oligarchical*, or *democratic* constitution.
7. The system or body of fundamental principles according to which a nation, state, or body politic is constituted and governed.²

¹ C James (ed), *Building the Constitution* (2000) xi.

² *The Oxford English Dictionary* (1989 – 2nd ed) Vol 3.

During the conference, at least one version of each of these meanings was put to work in order to talk about the activity of 'building' New Zealand's 'constitution'. The diversity of meanings may well have contributed to some considerable talking past each other among several groups of participants. This phenomenon may well have led those involved to think and talk about 'constituting' a plausible harmony. In this regard, the most suggestive conference paper for me was by Alex Frame, 'Beware the Architectural Metaphor', which provides several reasons for caution in using the 'building' metaphor in the title of the conference. One reason 'is the danger that the "architects" envisioned by the metaphor, however skilled and well-intentioned, neglect or lose contact with the life and energies of the peoples and cultures the edifice is intended to serve.'³ Frame went on to remark that 'law tends to grow organically, and will resist the attempts of technicians to force it into shapes designed to serve the interests of "social engineering" . . .'⁴ Frame's metaphor can serve as a departure point for thinking about how we might *constitute* talk about 'the constitution', knowing that the talk is not independent of the 'thing'.

* * *

A couple of years after attending the conference, I read for the first time White's reading, in *Acts of Hope*, of Richard Hooker's Preface to *Of the Laws of Ecclesiastical Polity* (1593). It struck me immediately that the reading would have served brilliantly as preparatory material for the conference, not the least in helping Frame frame his case about the limits of the architectural metaphor.

Readers of *The Legal Imagination* will be familiar with Hooker, for White's course book contains a lengthy passage from the Preface to his multi-volume work, which is an attempt to persuade Calvinists to conform to the laws of the Church of England. In White's introductory words in *The Legal Imagination*: 'The Calvinist position was that there had been a falling away from the true and simple principles of early Christianity, and that questions of church governance, doctrine, and practice should be settled by the plain meaning of the Holy Scriptures without reference to the customs and

³ A Frame, 'Beware the Architectural Metaphor' in C James (ed), *Building the Constitution* (2000) 426, 427.

⁴ Ibid 428.

practices that had evolved over the years.’⁵ In the Preface to the *Polity*, ‘Hooker addresses the Calvinists directly, explaining what he thinks is at stake in the dispute and hoping to set the terms by which it will proceed.’⁶ The passage that White reproduces ‘can be taken as expressing a way of responding to and dealing with the views of others, whether expressed in rules or some other form, and as defining a process of argument and reasoning by which differences in judgment and inclination can be addressed.’⁷ After the passage, White offers two fundamental questions, both of which concern not only the *Polity* but a passage from Plato’s *The Republic*, about the character of justice:

It might be suggested that both Hooker and Plato define justice not by stating certain rules or doctrines or principles of public life, but by demonstrating certain ways of reasoning and conversing about important matters. Justice is defined by the intellectual processes through which the best men reach conclusions and argue about them.

1. Do you agree with this interpretation of what Hooker and Plato are saying? How can you define the processes of reasoning and conversation which each one celebrates.
2. Does the view attributed to Plato and Hooker have any validity as applied to modern law? How would you define the processes of reasoning and conversation which constitute the heart of modern justice?⁸

White’s reading of Hooker in *Acts of Hope* can be read as a response to these questions. Let us give particular attention to White’s efforts to ‘define the processes of reasoning and conversation which [Hooker] celebrates.’

Like the other chapters in *Acts of Hope*, White’s chapter on Hooker, which is subtitled ‘Constituting Authority in Argument’, is concerned with forms of talk that have a claim on our attention and respect. Framing his reading, White writes:

The forces with which Hooker contended were . . . central to the life of the church and nation . . . Protestantism . . . brought to the surface of consciousness and made real the question that

⁵ *The Legal Imagination* 670-71.

⁶ *Ibid* 671.

⁷ *Ibid*.

⁸ *Ibid* 682.

has occupied political philosophy and constitutional discourse ever since: What person, or institution, or set of practices, should have authority over others, and why?⁹

Hooker . . . knows that there are those who are unpersuaded by his views on the merits, especially those who think that scripture enjoins a presbyterian form of government and a puritan style of worship. His aim is not to dismiss these people, but to establish the grounds upon which his differences with them can be argued out. . . . Hooker addresses a situation in which one authority has dissolved, leaving nothing that can automatically take its place. He faces, that is, the problem of justice and politics in the modern world.¹⁰

Under the circumstances as he understands them, all we really have is our differences of view and the opportunity to discuss them . . . Hooker is himself directly engaged in the rhetorical creation of authority, and he knows it. For him, . . . the authority he recommends will be the authority of a certain kind of thought, speech, and argument, in which he himself engages. This . . . is the authority of a community as well, the community he seeks to create in the text. He is trying to create a rhetorical community, a community of people thinking and talking certain ways, and to do this not only with people disposed to be like-minded but with those disposed to disagree with him on fundamental substantive matters. This community, established first in his text and then, if his text succeeds, in the world, is the true source of authority he offers his reader.¹¹

Hooker's *Polity* thus is not abstract and theoretical work but an effort to compose a workable mutuality out of discord. His composition is an act of hope, an act that has captured White's attention, not the least it seems as a model for his own writing, which can be read as a self-conscious 'rhetorical creation of authority'.

In its effort to contribute to the reconciliation of opposed forces, Hooker's *Polity*, as Harold Berman put it, 'laid the foundations for what in the seventeenth century became the first distinctively English jurisprudence.'¹² After taking us through fragments from the opening of Hooker's work, White offers an image of the heart of these foundations:

[A] rhetorical view of life [is] founded on uncertainty of knowledge and difference of opinion [T]he way Hooker proposes to live on such conditions is rhetorical . . . : not by

⁹ *Acts of Hope* 90.

¹⁰ *Ibid* 92.

¹¹ *Ibid*.

¹² H J Berman, 'The Origins of Historical Jurisprudence' (1994) 103 *Yale Law Journal* 1651, 1664.

conclusive logical or factual demonstration but by argumentative conference, by distinguishing between what matters essentially and what matters little, and by constant recognition of the fact that we need some way to live together or we shall split into tiny fragments. This means granting authority both to decisions regularly reached by the community's regular officials and, more important, to judgments reached in conference, after deliberation and argument. It makes discussion of a certain sort its highest authority (saving always the plain commands of scripture); and the question, what kind of discussion this should be, Hooker is answering by performance.¹³

Hooker's text . . . offers its reader the experience . . . of persuasion. . . . Hooker seeks to constitute his reader as one who, like him, has views, arguments in support of his views, disagreements with others that he does not expect to be resolved by eventual concurrence of minds, and the wish to resolve these differences by something other than war or separation. Hooker's version of this wish is for a certain kind of argument in which each side, while not giving up its commitment to its own views and arguing for them strenuously, recognizing that the larger goal of unity and peace may require the subordination of judgment, on some kinds of matters at least.¹⁴

For Hooker, as for White, 'rhetoric' is not that which is left over when rational argument has come to an end (*Rhetoric). Hooker knew that he could not create a workable mutuality through 'conclusive logical or factual demonstration', for the disputants had yet to come to an agreement on an initial set of premises. The 'fact' of the inability of 'logic' to generate premises directs attention to the vitally important role of noble rhetoric, without which we cannot hope to avoid 'war or separation'.

White's reading of the *Polity* is done in the echo of his reading of Shakespeare's *Richard II*. For White, to recall (*Attunement), at end of the play 'we are left in the modern world, in which it is most unclear what can count as a ground upon which one person can have power over another, and why.'¹⁵ At the end of his reading of Hooker, White goes makes this connection with the play:

All this could be read as a . . . performed response to the question left us by *Richard II*, for it says that we can address the vacuum created by that play by speaking to each other in a

¹³ *Acts of Hope* 104.

¹⁴ *Ibid.*

¹⁵ *Ibid* 74.

certain way—rational, respectful, invoking common human experiences, and subject to certain procedural forms. His proposal is that the opposing forces constitute a new community, formed by their understandings as to the way in which their differences should be addressed and resolved. This is in fact a proposal for a kind of constitution, in essence like the American one in fact, which could also be defined as a set of understandings about the ways in which differences should be defined and addressed. In both cases, of course, these understandings require the affirmation of what is agreed to as well, for only by such affirmations can difference be defined. In this sense Hooker's is a proposal for rhetorical cohesion through the prosecution of difference. This conversation, if you will engage in it on my terms, he says, is the way that we will remake and reform the institution of government and life we call the church.¹⁶

How are we to read this passage? White may be read as participating in (and inviting his reader to join him) reconstituting a long, long 'conversation'. This conversation is nothing less than 'the way that we will remake and reform' the (modern American) 'constitution'. The conversation metaphor, I suggest, is an apt one for importing to New Zealand. To begin with, it may help those who insist that 'we do not even have a constitution' to appreciate how silly this claim is from a certain standpoint and how destructive it might be if it serves to prevent real conversation on the vital matter of who 'we' in New Zealand want to become in the inescapable process of reconstituting our constitution.

* * *

After his reading of Hooker, White turns to Sir Matthew Hale's essay *Considerations Touching the Amendment or Alteration of Lawes*, which was written about 1665 and published posthumously, in 1787.¹⁷ Concerning the character of the essay: 'this is not a speculative or abstract piece, pursued for purely intellectual reasons, but a response to his own actual experience of law reform and its difficulties, both during the interregnum and after the Restoration'.¹⁸ Hale came to the law in turbulent times, and the place from which he wrote was not some theoretical Archimedean island but in the midst of discord. This makes him an attractive figure for White.

¹⁶ Ibid 119.

¹⁷ M Hale, 'Considerations Touching the Amendment or Alteration of Lawes' in F Hargrave, *A Collection of Legal Tracts Relating to the Law of England* (1787) 253-89.

'You can argue either way', lawyers commonly respond when asked a question of law. Hale's essay, White suggests, is an exemplary model for giving that phrase life. After reproducing an early fragment from the *Considerations*, White writes:

He is committed . . . to the composition of the text on rhetorical or literary principles, to a text, that is, whose merit, and whose modes of coherence, lie in the inclusion of contraries and contradictions, not in logical purity or consistency.¹⁹

[T]he text works, as its title suggests, as a mode of considering a situation, or as what I have called a way of thinking and talking. It proceeds from the middle, and self-correctively, focusing on the tendencies to foolishness that it is human nature to exhibit. . . . Like . . . the legal hearing and the judicial opinion too . . . it works by inclusion, by canvassing the possibilities for thought or speech that a situation presents, trying to bring them all into mind at once.²⁰

Hale is a member of a conservative tradition that reveres tradition. The words 'conservative' and 'tradition' are frequently used in a simplistic way, such as to label someone as for the 'status quo' rather than changing it. But 'it' is not a fixed entity. On defining Hale with regard to 'tradition', White says: 'He thinks of tradition as containing principles of change as well as constancy, thus capturing in one image the whole habit of his mind to think in terms of contrary tensions.'²¹ The activity of 'reforming' tradition, we might say, is a method of continuing with tradition. Hale was a conservative reformer of tradition.

There is no way that one can step outside of tradition. For Hale, we humans constantly participate *in* tradition. In this spirit, reforming law cannot be done from outside tradition. Concerning the distinction between the inside and the outside, White writes:

It is an apparent premise of most of our talk about law, perhaps built into the nominalizing and labeling tendencies of our language, that law exists outside of us, as the speaker and hearer, in the world, as a social phenomenon. And of course in some sense it does, but only

¹⁸ *Acts of Hope* 130.

¹⁹ *Ibid* 133.

²⁰ *Ibid*.

²¹ *Ibid* 145.

insofar as we define ourselves as external to the community and discourse it defines. Once we recognize that this is our law, either because we are lawyers or because it speaks to us, things change. Law has its meanings in the readings we give it; I believe it has its continued life and authority, indeed its continued shape, through our understanding and acquiescence, and through the texts we make as well. For what is granted authority is not only the set of prior texts themselves but the processes by which they are both interpreted and rewritten (or 'reformed'), and our participation is essential to both. . . . Hale in his context makes plain . . . that the authority of the laws he discusses is secondary to the authority of the discussion itself, and not merely to its intellectual aspect: to the community he establishes in his text, with the past and its texts, with his inherited languages, and with his readers, actual and potential. Here is the performance of the text, is where its claim to authority rests; and this performance works as a definition of the 'law' it speaks about, just as Hooker's performance defined the 'church' for whose authority he was making an appeal.²²

White, we can be sure, would hope that his reader attends to his 'performance' in composing Hale. Just as there is no 'the law itself', there is not any 'Hale himself'. White unavoidably gives Hale's *Considerations* some of the meaning he claims for it. If White's reader is able to tune in to his performance, then she will be well placed to tune in to her own performance in composing White. She then may become an 'authority' on 'White'.

* * *

In *When Words Lose Their Meaning* White reads Burke's *Reflections on the French Revolution* as performing a 'truly remarkable achievement: it has given us a new idea of what a constitution is, what an individual is, and what kind of relation can exist between the individual and his world.'²³ Let us briefly attend to this achievement.

Burke begins his essay as a letter to a 'very young gentleman at Paris' who has asked him about his position on the French Revolution.²⁴ The gentleman believed that, as a supporter of 'liberty', Burke would support it. He was wrong. In an early passage Burke argues against thinking about 'liberty' abstractly:

²² Ibid 147.

²³ *When Words Lose Their Meaning* 228-29.

²⁴ E Burke, *Reflections on the French Revolution* (1790; 1898) (ed E J Payne) 3.

I should . . . suspend my congratulations on the new liberty of France until I was informed how it had been combined with government; with public force; with the discipline and obedience of armies; with the collection of an effective and well-distributed revenue; with morality and religion; with the solidarity of property; with peace and order; with civil and social manners. All these (in their way) are good things, too, and without them liberty is not a benefit whilst it lasts, and is not likely to continue long. The effect of liberty to individuals is that they may do what they please; we ought to see what it will please them to do, before we risk congratulations which may be soon turned into complaints.²⁵

Burke here suggests that we cannot think of 'liberty' in isolation – its meaning is not independent of how it is 'combined'. This suggestion can be imagined as the base for all that he goes on to say.

In the spirit of the great common lawyers before him, including Hale, Burke was critical of forms of reasoning, including 'abstract' rights talk, which ignored what he saw as the crucial significance of 'circumstances'. In his words:

Circumstances (with which some gentlemen pass for nothing) give in reality to every political principle its distinguishing colour and discriminating effect. The circumstances are what render every civil and political scheme beneficial or noxious to mankind. Abstractly speaking, government, as well as liberty, is good; yet could I, in common sense, ten years ago, have felicitated France on her enjoyment of a government (for she then had a government) without inquiry what the nature of that government was, or how it was administered?²⁶

For Burke, the French revolutionaries were engaged in a power-grab that would result not in 'liberty' worthy of the name but in a significant disruption of collective identity, which provides the very roots that enable any party to have any power in the first place.

An image Burke used for the corrupting power of language is Babel, a symbol for confusion that threatens to destroy civilisation. Burke sensed such confusion in the language of the French revolutionaries:

²⁵ Ibid 9-10.

²⁶ Ibid 8-9.

Humanity and compassion are ridiculed as the fruits of superstition and ignorance. Tenderness to individuals is considered as treason to the public. Liberty is always to be estimated perfect, as property is rendered insecure. Amidst assassination, massacre, and confiscation, perpetrated or mediated, they are forming plans for the good order of future society.²⁷

Here Burke directs attention to a linguistic collapse that is associated with the social and political one. Now no one could talk with much meaning about 'liberty' and 'property' and their companion term 'security' when there was not the cultural stability required for them to have a meaningful place.

The heart of White's reading of Burke is the identification of his presentation of intimate relations between language, self, and culture. Let White speak on this matter:

Burke offers his reader a language that . . . defeats cliché by complication, distinction, and composition. This is meant to be a language of generality to which the reader may turn from any of the activities of life in order to claim a meaning for what he does and to connect it with the rest of life; it is truly a constitutional language. . . . Burke imagines . . . a reciprocal relationship between self and culture, which can work to good ends or bad. When it works well, as it does under his 'British Constitution,' we find good men in positions of authority, capable of conserving what is best in what they have inherited and of reforming whatever is defective; such men maintain and improve a constitution that tends to produce, and place in authority, other men of similar ability and virtue, and so on. When it works badly, as it does in 'France', deterioration of culture leads to deterioration of character, and vice versa, in a continuing accelerating movement of dissolution. This is what Burke means when he says, 'Man [is] . . . is in a great degree a creature of his own making.'²⁸

This 'reciprocal relationship' brings to mind Gunnar Myrdal's principle of cumulative causation, which he first expressed in *An American Dilemma* (1944).²⁹ Myrdal described a process in which parts of a whole social system respond to or affects other parts, and changes in the system can accumulate, causing changes in one or another direction through the whole system. There can be a 'vicious circle', with the dynamic process moving in a harmful direction, and a 'virtuous circle', with forces moving in a positive

²⁷ Ibid 150.

²⁸ *When Words Lose Their Meaning* 208-11 (page references omitted).

²⁹ G Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (1944; 1996) 75-6.

direction. (Central to Myrdal's conception of the 'race problem' was a vicious circle: the persistence of racial stereotypes in the minds of whites helped perpetuate the poverty and powerlessness of blacks, and the actuality of poverty and powerlessness helped reinforce the stereotypes.) Burke's *Reflections* can be read as a guide – with 'parts' including language, character, and institutions – for the British for staying out of the vicious cycle in 'France' and for continuing with their virtuous cycle.

The guide metaphor, however, is inapt. White suggests that Burke's essay is not so much a guide as an actual contribution to the reconstitution of a 'part', namely language, which can constructively contribute to the reconstitution of other parts, and so on – in a process of cumulative causation. In a passage that further defines through contrast Burke's act of 'composition', White writes:

Burke's purpose in the *Reflections* is not to communicate ideas that are already perfectly statable in existing languages but to make a language in which new ideas and new sentiments can be expressed, a new constitution established, in the text and in the world: a language he wishes his reader first to learn and then to own and use. It is essential to his purpose that this language be literary in character, not 'theoretical.' In reading this text, one cannot extract a word from its context, give it a stipulative meaning, and then place it in a statement of abstract theory without doing violence to Burke's text and mind and to our experience of both. Each word is attached by a dozen strings to other words (as we quickly see when we try to isolate one for analysis), and each of these in turn, is similarly connected with other words. Thus . . . 'property' and 'religion' are as inextricably linked in Burke's language as they are (in his view) in the world, and that world is itself, the creation of the text.³⁰

For White, Burke's organicism invites, or perhaps demands, us to resist dividing a language into parts and treating them independently of the whole and of the relations among the parts. The meaning of a word is not an object that can be captured in a dictionary but rather an experiential process of becoming whilst the word is used with other words in a particular context.

From beginning to end in the *Reflections*, Burke maintains a manner of expression which is non-technical. This manner is significant for White:

Burke insists throughout the *Reflections* that the language in which he works will be real English, with all its richness and complexity of associations, its tensions and ambiguities – its correspondences with the society and culture of which it is in some sense the central part – rather than a language of theory. Burke's insistence on using a language of feeling and action and judgment . . . is essential to his achievement as a whole, since for him, as for us, there is an intimate and necessary connection between the organization of language and the organization of community – between 'text' and 'constitution' – and between both of these and the organization of the individual mind.³¹

Burke would have rejected what modern philosophers of language call the 'reflective' approach to meaning, whereby meanings can be fixed in language.³² For Burke, as for White, all language involves interdependencies between words (and other non-verbal signs) that are complex and contextual. This is in line with the 'constructivist' or 'constitutive' approach to meaning, whereby meaning is made in a process of making various kinds of distinctions and combinations.³³

According to White, a central aim of Burke's essay is this: 'that its reader will come to talk the language of the British Constitution and thus become a member of the community that that language creates'.³⁴ This 'language', for White, is ill-suited to those who manifest a will to 'proposition':

The ideal reader of the *Reflections* would . . . not say at the end that he now 'believed in' certain propositions for 'certain reasons.' He would see the world differently, would conceive of himself and his nation differently, would think, speak, and act differently. He would have mastered a language of fact, motive, and sentiment that would affect his conduct and his feeling forever. The text seeks to persuade its reader not to a set of propositions but to a language – a language of belief and action. It means to offer him an education that will equip him differently for life.³⁵

Burke's 'ideal reader', we might say, has been reconstituted in the sense of coming to some new awareness of her place in the world, of her powers and obligations. So too

³⁰ *When Words Lose Their Meaning* 217.

³¹ *Ibid* 199.

³² S Hall, *Representation: Cultural Representations and Signifying Practices* (1997) 24.

³³ *Ibid* 25.

³⁴ *When Words Lose Their Meaning* 192.

³⁵ *Ibid* 194.

White's ideal reader. White, we might say, has reconstituted Burke's reconstitution of the word 'constitution'. We might think about writing a letter to the editors of the *OED* and invite them to read White for the purpose of expanding their explanations for several of their meanings.

* * *

After his reading of Burke's *Reflections* White turns to some American constitutional materials, including the Declaration of Independence, the Constitution of the United States, and Chief Justice Marshall's opinion in *McCulloch v Maryland*. Let us join him at the Constitution.

White asks these questions: 'What kind of life does it make possible? What roles does it establish? What relations does it define among them? What opportunities for speech and thought does it create?'³⁶ Beginning with the Preamble:

[T]he text does purport to speak in a single voice for the people as a whole: 'WE THE PEOPLE of the United States . . . do ordain and establish this Constitution for the United States of America.' This is a claim to speak for an entire united nation and to do so directly and personally, not in the third person or by merely delegated authority. . . . 'The People' are at once the author and the audience of this instrument.³⁷

White appreciates that there is a sense in which the statement 'WE THE PEOPLE' is a fiction, not the least because of a significant degree of exclusion at the level of participation, including the process of ratification. As such, we might ask, does White direct attention to the sham? But sliding from 'fiction' to 'sham' is problematic, for the word fiction need not be pejorative. (Elsewhere, White writes: '[W]ould it really have been better of the Constitution had said, "We, the voting population of propertied white males, do hereby ordain and establish this Constitution of the United States?" I think we know the answer to that question.³⁸) White goes on to suggest some positive possibilities of the 'fiction':

³⁶ Ibid 240.

³⁷ Ibid.

³⁸ *From Expectation to Experience* 3.

The Preamble makes additional claims for 'The People' who are its author and audience. The diction tells us, for example, that they are engaged in an act that is sacred as well as secular in character and authority, for we know that ministers are 'ordained' and that churches as well as constitutions are 'established.' The people are . . . purposive and energetic. "WE' do this, the sentence says, 'in Order to form a more perfect union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity.' This clause . . . adds a great deal: it defines its author not as a people at rest, acquiescing in what is, but as moving toward what should be, shaping their lives by intention, action, and hope. And the better things that define their hope are not marginal improvements in life but the essence of collective happiness: union, justice, tranquility, defense, welfare, and all the 'Blessings of Liberty.'³⁹

The Constitution is an act of 'hope', which does not lend itself to the kind of talk that goes by the name 'the economics of . . .', which is principally concerned with 'marginal improvements in life'. Like all of his 'reading', we can take it that White's reading of the Constitution is also an act of hope. A hope for what?

Immediately after the Preamble, the lively unitary voice changes, as it must sooner or later do if it is to provide a basis for a collective life. White tells us:

[I]n the body of the Constitution this 'one people' is immediately divided up into parts: the separate states, the branches of the federal government, the individual persons who fill various offices, and the citizens (who are protected against ex post facto laws, are guaranteed the writ of habeas corpus, and so on). The only respect in which the Constitution makes the claim that its people are 'one' is in the establishment of the Constitution itself; once that is done, they are free to engage in the ordinary competitions of trade and politics, to pursue their conflicting interests, to form clubs and factions, and to seek and exercise power, so long as they do all of this on the conditions, and, where relevant, in the ways that the Constitution establishes.⁴⁰

An 'economics of . . .' practitioner may well tell us that the Constitution is a 'product' of 'the ordinary competitions of trade' and that the sum of the product is merely the sum of its 'parts'. Whatever the case might be about such a practitioner, we can sense

³⁹ *When Words Lose Their Meaning* 241.

that White is suggesting the Constitution is much more than this. He is suggesting, by my reading, that it is part of a discourse that is qualitatively different than calculating talk. Like his own talk about it, it has an element of aspiration.

After some further ear reading (*Listening) of the Constitution, White turns to the *McCulloch* case. *McCulloch* was principally concerned with this question: Has Congress the constitutional power to establish a national bank?'⁴¹ This question, as White points out, had been around for some years. Seeking cabinet advice, President Washington had put the question to Thomas Jefferson and Alexander Hamilton in the early 1790s, when Congress chartered the Bank of the United States. For Jefferson, the creation of such a bank was not within the powers of Congress enumerated in Article 1 nor within the General Welfare Clause (Article I Section 8: 'To lay . . . Taxes . . . , to provide for . . . the general Welfare of the United States') nor the Necessary and Proper Clause (later in Section 8: 'To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States . . .'). For Hamilton, Congress had certain implied powers, and the creation of a national bank could be reasonably claimed to be among them. The differences between Jefferson and Hamilton were connected with different ways of imagining the identity of the parties to the Constitution. For Jefferson, the Constitution was a compact among thirteen sovereign Peoples, and the Article I should be narrowly construed in accordance with the traditional rule that treaties generally be interpreted narrowly.⁴² For Hamilton, the Constitution was a grant of power by one People to a special set of national agents: 'This restrictive interpretation of [Article I] is also contrary to this sound maxim of construction; namely, that the powers contained in a constitution of government, especially those which concern the general administration of the affairs of a country, its finances, trade, defense, etc., ought to be construed liberally in advancement of the public good.'⁴³

The Bank of the United States did get established with a planned life of twenty years. After it expired Congress established the Second Bank of the United States for the purpose of trying to put an end to economic disorder. Southern and western states

⁴⁰ Ibid.

⁴¹ Ibid 247.

⁴² A R Amar, 'Of Sovereignty and Federalism' (1987) 96 *Yale Law Journal* 1425, 1453.

expressed their belief that the Bank inhibited the growth of capital in their regions and that it engaged in some problematic fiscal practices. In response, some states taxed it significantly. The state of Maryland claimed that the Bank owed it \$15 000 in state taxes. James McCulloch, the cashier of the Baltimore branch, refused to pay the tax. A legal case began.

Concerning the identity of 'the people', what is Marshall to make of the claim, by counsel for the state of Maryland, to consider the Constitution 'not as emanating from the people, but as the act of sovereign and independent states.'⁴⁴ By this claim, 'The powers of the general government . . . are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion.'⁴⁵ Marshall offers a lengthy response, part of which is as follows:

It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligations, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might 'be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification.' This mode of proceeding was adopted From these conventions the constitution its whole authority. The government proceeds directly from the people; is 'ordained and established' in the name of the people The constitution . . . bound the state sovereignties. The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.⁴⁶

What is striking to me here is the qualification, '(whatever may be the influence of this fact on the case)'. Marshall seems to be suggesting that it may not make any significant difference to the result of the case whether starts out from the position that the Constitution was a compact between sovereign Peoples or a grant by one People.

Marshall stressed that the Constitution had to be drafted broadly and that it was not to be regarded as a 'legal code':

⁴³ Quoted in Amar, *ibid*.

⁴⁴ *McCulloch*, *op cit*, 402.

⁴⁵ *Ibid*

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the proximity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is *a constitution* we are expounding.⁴⁷

How are we to read that oft-quoted passage? What does the phrase ‘it is *a constitution* we are expounding mean’? In considering that question, we must never forget that words do not speak for themselves.⁴⁸

I say in that last sentence ‘we’. What, or who, is in that pronoun? Might we do well to ask the same question of Marshall’s ‘expounding’ sentence?

Immediately after quoting the ‘expounding’ passage, White offers this comment on the direction in which Marshall has taken his reader:

We can now see that everything that Marshall has said so far has been intended to reduce the embarrassment presented by the following obvious argument: ‘The United States is a government of enumerated powers; the power to create a bank is not among them; therefore, it is in excess of them and invalid.’ Marshall’s effort has been to establish the conditions on which he could claim that such a reading, which would perhaps be appropriate to a ‘legal code’ or to an interstate agreement, is inappropriate to a ‘constitution,’ which by its nature requires not mere explication but what he calls ‘expounding.’⁴⁹

⁴⁶ Ibid 402-5.

⁴⁷ Ibid 406-7.

⁴⁸ Words always come from someone, who is directing them to someone else, even if they are part of a soliloquy and, as such, claims about ‘the meaning’ of the ‘plain’ or ‘literal’ words problematically erases this relational and contextual dimension of language.

⁴⁹ *When Words Lose Their Meaning* 255.

White here claims that the activity that Marshall calls 'expounding' is more complex and demanding and creative than that which goes by the name 'explication'. To that claim, I would simply add this: that which we commonly call 'interpretation' cannot simply replace 'expounding' – a distinction needs to be made, for we are concerned with an uncommon kind of reading. Let us call it 'compositional', in the sense . . .

Immediately after his paragraph on Marshall's 'expounding' paragraph, White's reading takes something of a spiral. He comes at the character of 'expounding' from a slightly different angle:

What is there about the Constitution that leads to these consequences? Part of the answer, as Marshall says in the paragraph just quoted, is the fact that any attempt to reduce all the powers to explicit statement would be impossibly complicated. But there is another line of argument, never made explicit by Marshall, and it is even more fundamental. It rests on the very material we have had difficulty in explaining, namely, the passages addressed to the question whether the Constitution is the act of the people or of the states. For who are these 'people,' and where are they now? In Marshall's rhetorical universe, the 'people' are defined by their one great collective act of self-constitution. They existed once in time only, when the Constitution was made, and have since resolved themselves into their constituent units and groupings—as states, officials, individuals, and factions. The 'people' thus no longer exist among us, and never can again. They have left behind them this instrument, the Constitution, which is technically amendable but was meant in its essentials to endure forever. Unlike the legislatures, unlike the states (had the Constitution been regarded as a compact among them), the 'people' are not here to correct what we do, and the instrument was composed with the knowledge that they would not be. This is why it contains no technical rules telling us how it should be construed, or, as lawyers say, what 'construction' it should be given. And this is also why it would be impossible for it to address every contingency in detail. The 'people' of whom Marshall speaks existed only in their act of constitution, in a kind of momentary incarnation; everything achieved by the Constitution had to be achieved at one time; it could not be developed in stages or by gradual adjustment to experience. The people thus left behind them a testamentary trust that has something of the character of a sacred text. It is an instrument that requires a special kind of reading Marshall will give it.

This view of the Constitution establishes not only Marshall's point about the way in which the grant of powers should be read but his own position as the authoritative reader of it. As the expositor of the text that expresses the will of 'the People,' our only sovereign,

Marshall claims to be the only instrument through which their will can be done. Far from holding a lifetime appointment against the rules of democracy, . . . Marshall implicitly says that his position is, of all positions, the most perfectly justified by the central principle of our democracy, for he alone expounds the instrument that is the single act of 'all the people.' He is indeed the voice of the people. His role is like that of a priest as well as that of a trustee, and he is entitled to this position by his excellence at the activity he calls 'expounding.'⁵⁰

White here can be read as expounding on what Marshall means by 'expounding', as giving a special kind of reading to 'a special kind of reading'. Marshall's opinion, for White, vibrates a certain authenticity, not the least to the extent that there is no pretense that 'the law' is a system of known rules applied by the Court: a process of law-making is at work and can be seen to be at work. Yet that which 'can be seen' is not simply 'out there'. In identifying Marshall as having adopted a 'role . . . like that of a priest as well as that of a trustee', White perhaps can be taken to be reaching for the Marshall within him and adopting a role like that of a priest as well as that of a trustee. We who have reread and reread and reread the Constitution's first seven words – 'We the People of the United States' – can now do so again with modified ears. Having become estranged from the familiar (*Alienation), those seven words have become full of mystery, which can readily be extirpated by merely interpreting them, perhaps aided with a dictionary.

* * *

What kind of education is called for to equip students for American constitutional discourse? White provides an outline of his approach to teaching in an essay *Doctrine in a Vacuum* (1985), in which he offers 'reflections on what a law school ought (and ought not) to be'.⁵¹ The essay is addressed 'mainly to . . . the students and faculty of the University of Michigan Law School' and it 'is meant to be part of a conversation in which members of this community talk to each other about the life they share'.⁵²

⁵⁰ Ibid 255-56.

⁵¹ J B White, 'Doctrine in a Vacuum: Reflections on What a Law School Ought (and Ought Not) to Be' (1985) 18 *University of Michigan Journal of Law Reform* 251, 251.

⁵² Ibid.

Resisting the teaching of 'doctrine in a vacuum', which reduces the student to 'one who is to acquire information',⁵³ White asks these questions:

Can we find a way to teach that recognizes that our students' capacities and virtues are different from one another? That we ourselves have different things to teach? That the subject 'law' is not the same in every classroom any more than the subject 'history' is? And can the students find a way to assume more responsibility for their own education, conceiving of themselves as engaged in a project that has its own interest and importance to them, independent of its significance as pre-license training? Can their education be seen as truly a liberal education, *i.e.*, as the development of their own individual capacities, not as a training into a sort of sameness? Put slightly differently, can we come to see that the law we teach, and that we hold out as entitled to respect and authority, is not a set of rules to be learned but a set of ways of thinking and talking and acting together about questions of justice, a method and a community which it should be our task to exemplify and constitute?⁵⁴

Constituting a law classroom a certain way can serve as a model for engaging with the Constitution. The activity of questioning, authentic questioning, really matters (*Questioning). As Chief Justice Marshall would have appreciated well, '[t]he real creativity in a judicial decision lies in the question that judges decide to accept as the basis of their deliberations.'⁵⁵ The same could be said about creativity in legal education, though with teachers rather than judges. We can be sure that White is not one of the many jurisprudents who 'will go on debating the question whether there is a place for "dynamic" this-or-that in the rule of law, fretting over the whereabouts of the camel's nose, and insisting that there is a *rail out there somewhere*.'⁵⁶ If White's concern with 'questions of justice' sounds to you, to use Richard Posner's words, 'the airy realm into which few lawyers soar',⁵⁷ I hope the sound will change during this Thesis.

Talk about justice is often said to be subjective, not objective. Legal knowledge, in contrast, is often talked about as something objective, out there where it can be found

⁵³ Ibid 253.

⁵⁴ Ibid 258-59.

⁵⁵ R A Ferguson, 'The Judicial Opinion as Literary Genre' (1990) 2 *Yale Journal of Law & the Humanities* 201, 208.

⁵⁶ P M Brennan, 'Asking the Right Questions: Harnessing the Insights of Bernard Lonergan for the Rule of Law' (2005) 21 *Journal of Law and Religion* 1, 5.

⁵⁷ R A Posner, *Law and Literature: A Misunderstood Relation* (1988) 53.

and then passed around like a commodity. (After reading White we may hesitate to use the word 'commodity' as if we 'own' it. What *is* a commodity?) Immediately following the passage quoted above, White suggests otherwise:

The starting point would be to conceive of legal education not as professional training alone but as the education of the individual mind. . . . Her mind is trained, of course, in a specific professional context – it is the language of the law, not of medicine or linguistics that the law student learns to understand, to recast, to remake, and this part of the training is also important. But this fact is secondary: the kind of knowledge with which a true education is concerned is never repeatable data, but a knowledge that entails a use or activity – a knowledge of practice that is a kind of action, including a kind of invention or creation. . . . What you learn in law school is not law in the sense of repeatable propositions but how to learn law – that is, how to do it and how to make it. In an important sense 'the law' one studies is thus the law that is actually made in the classroom, made out of the materials of case and statute, as the class thinks and talks about particular questions. A good law school is thus a school of law-making. This means that the proper focus of attention is not what the student is learning to repeat or describe but what she is learning to see and to do; on the doctrine or language of the law not abstracted from experience, but embedded in it, as the object and medium of thought, expression, and intellectual action.⁵⁸

Legal knowledge, for White, is like knowledge of a language, which is not an entity but a medium with which one can become competent in using in order to accomplish certain purposes. Constitutional law is in a process of becoming, in part through the process by which the law classroom is constituted.

Central to White's efforts to resist doctrine in a vacuum is his metaphor of 'composing'. This metaphor offers a point of departure for giving new life to the word 'equality' (*Equality):

In this kind of legal education the student is defined not as a learner of facts and doctrines and rules . . . but as a speaker and writer, the maker of new compositions. Attention is focused on what the student can find (or make) to say, and upon the resources and limits of his mind and his language.

⁵⁸ 'Doctrine in a Vacuum' 259-60.

This conception of the student is inherently egalitarian. If two people speak to each other fully as composers they must speak as fellow composers; no imaginable relation other than equality can exist between them, for they share a situation that is at root identical and they focus attention on what is common in their lot and life. To conceive of the student as composer is also to recognize his autonomy and individuality, for composition is of necessity an independent act done by individual minds. The student who learns to compose in legal language learns something of his own responsibility for what he does; of his own strengths and weaknesses; of his own place in the world. At best he makes a voice of his own: not a private voice, not the voice of any-person-talking-as-a-lawyer, but a voice of his own as a lawyer. In my own view, indeed, that could be taken as the central aim of a legal education.⁵⁹

Anyone in White's audience who is unfamiliar with White's course book may now have some sense of the significance of the word 'imagination' in the title. His reader, who is White's fellow 'composer', is provided with materials with which to learn 'to understand, to recast, to remake ... the language of the law'. He takes legal knowledge to be 'a knowledge of practice that is a kind of action, including a kind of invention'. His 'starting point' is not 'rules' and 'doctrine' (at least of the kind that are 'abstracted from experience') but ourselves and what might become of us as we engage in 'law-making'. He speaks of the law not as an object, a thing, but as a 'do'-ing, and in doing law the lawyer is reconstituting 'language' and 'community'. In his concern for the student learning something of her 'own place in the world', White suggests that the ancient motto 'Know Thyself' is a worthy one to live by, and to be realized not in isolation, in 'private', but in 'community', through the Other. The faculty of the imagination is central to all of this. This faculty is not opposed to 'rationality' but inescapably involved in defining and judging whatever we make it (*Imagination; Rationality).

As an eavesdropper, I read the above passage as an invitation to an extraordinary conversation, the heart of which is concerned with constituting a rhetorical equality among participants. This Thesis is written out of a desire to join this conversation and in doing so establish a 'place' from which, and a 'voice' with which, I can speak for the purpose of 'composing' law in harmony with 'justice'.

⁵⁹ Ibid 261.

Equality

‘[A]ll men are created equal’, claims the Declaration of Independence. What can that aspirational phrase be reasonably made to mean? More broadly, what is to become of the word ‘equality’? What new meanings can be given to it? What new meanings are worthy of respect?

* * *

White offers material for equality talk in some prefatory remarks to *The Legal Imagination*. Here White directs attention to student-teacher and student-student relationships in the classroom:

[One] practice of mine . . . is to tell the student that if for any reason he does not wish a particular paper or portion of one to be duplicated, he need only indicate that when he hands the paper in. And since the major purpose of the course is to encourage him to form and work with his own interests, to make his own questions, I begin the course on the understanding that he is free to disregard any assignment if he wishes and hand in a paper on some other topic instead. I also agree to read any writing of any kind that he does during the semester. Not a great many students take advantage of these possibilities, but I am usually pleased when they do. One warning: to build a class around the writing of students is to subject their egos and emotions to considerable strain, especially where the recurring questions are perplexing and important ones – what sort of life can I make for myself as a lawyer? how do I define myself and my future in what I write? – and a class taught this way can work only if its members trust each other, if there is a sense of shared interest and concern. Partly for this reason I encourage the students to talk matters over outside of class and to feel free to read and criticize each other’s papers while they are in the process of composition. If the class is too large for the teacher to read every paper, I recommend the practice of having the students exchange papers for written comments before handing them in. This ensures that every paper has a reader, and of course the process of criticism is itself

of value. But most of all, it may help create the sense that we are all colleagues here. I do not think this course lends itself to teaching by competitive methods.¹

What kind of relation does White try to constitute between himself and his students? The word 'students' is to some extent inapt, for he wants to imagine that there will be a real sense in which 'we are all colleagues here.' Whilst White has apparently granted himself the liberty to pursue his 'own questions', he extends the same liberty to his 'colleagues'. These same liberties are not the foundations for a radical individualism, not least because a 'writer' needs a 'reader'. This 'reader' is not just *any* reader, for White's class 'can work only if its members trust each other'. For White, we can take it, there is a significant sense in which liberty and equality go hand-in-hand.

In *Learning From Law Students* (1994), Clark Cunningham, a former student of White's, reflects on his experience teaching with *The Legal Imagination*. He contrasts White with the fictitious law teacher Charles Kingsfield, who became (in)famous through the book, movie and television series *Paper Chase*.² Kingsfield claims to use the Socratic method in legal education,³ but Cunningham casts doubt on the claim:

[T]he Kingsfield method does not indicate to the student that the professor expects to learn something new from the student or to have her own understanding effectively refuted. Indeed, there seems to be a fundamental epistemological difference between Socrates' dialectical approach and the Kingsfield method. Students who enter a Kingsfield classroom are given the message implicitly—and sometimes explicitly—that their minds are to be wiped clean of whatever knowledge and methods of thinking they had acquired before law school. Learning to 'think like a lawyer' is a whole new mode of thought, and an important part of the teacher's task is to show students the deficiencies of their previous forms of analysis and discourse. . . . The purpose of Kingsfield's questioning is not a sincere effort by the teacher to learn more information from the student, but rather a rhetorical device to expose the inadequacies of the previous answer.

¹ *The Legal Imagination* Ibid xxii.

² J J Osborne, *Paper Chase* (1971).

³ For a helpful discussion challenging the claim, see J T Dillon, 'Paper Chase and the Socratic Method of Teaching Law' (1980) 30 *Journal of Legal Education* 529. Kingsfield's method arguably has 'nothing in common with Socrates, save that both asked questions' (531). In particular: 'Socrates' method was *dialectic* and Kingsfield's approach is *eristic*, or at least closer to the eristic. Dialectic is a sort of joint inquiry in search of a truth unknown to both participants, whereas eristic is a sort of contest of wits with the purpose of scoring victory over an opponent' (ibid).

In contrast, Socrates' dialectic method is founded on the belief that the conversational partner is a source of fundamental knowledge and, indeed, that true education is a process of recalling what one already knows at a deeper level. Socrates described his role as that of a midwife, bringing other men's thoughts to birth, stimulating them to think, not 'instructing' them.

...

I have taught my seminar, 'Law as Language, Law as Literature,' four times, each time using *The Legal Imagination* as the core textbook. My experience has been that the relation between law teacher and student (and among students) can change when we sit down to read literary texts together. The Kingsfieldian teacher is always suspected of 'hiding the ball': she knows the right answer already and is just waiting until the interrogative process either narrows the options to that answer or exhausts student imagination, at which point the teacher pulls the answer out of a hat. But even law professors are not expected to know all of the answers to how to interpret a Shakespearean sonnet or an essay by Proust. More importantly, the conventions of the discourse are different. Students know that they can draw upon their pre-law-school knowledge and experience and their own good sense.

As fellow literary critics, my seminar students teach me; but my most exciting learning experience is when students become authors in their own right. The invitational approach of White's textbook encourages students to venture their own experiences and insights; and since the third time that I taught the seminar, I have given students the option of writing their final paper based on personal experience. The quality and power of many of these papers has left me deeply impressed and moved. I am struck by the tragic loss in law school when students are treated as blank slates. Not only do law students bring to the school a variety and depth of life experiences (and academic training), necessarily well beyond the range represented by their teachers, but their very state of mind in law school is an invaluable resource. They are aware of something that their teachers have forgotten, of the opacity of legal language: what is visible to them (indeed the subject of intense observation) has become transparent to law-school graduates. Their capacity for thoughtful critique and dialogue may, therefore, exceed in important ways what can be found in the faculty lunchroom and at academic conferences. A mode of teaching that makes possible learning from law students, then, seems more truly Socratic than the approach that widely bears the name.⁴

⁴ C D Cunningham, 'Learning From Law Students: A Socratic Approach to Law and Literature?' (1994) 63 *University of Cincinnati Law Review* 195. Cunningham's article is part of a symposium organized by Thomas Eisele, a fellow former student of White's. Eisele has contributed to talk about Socratic questioning in legal education. See, for example, his 'The Poverty of Socratic Questioning: Asking and Answering in the *Meno*' (1994) 63 *University of Cincinnati Law Review* 221.

The central relationship in the Whitean classroom, between teacher and student, is the conversational relationship in which self and other constitute and reconstitute a joint inquiry into self and other. Such a relationship is based on a rhetorical equality, with one person speaking to another, each taking turns in listening (*Listening). The heart of the conversation is 'sincere' 'questioning' (*Questioning). This conversation proceeds from a collective perception of common humanity.

After experiencing the Whitean classroom, a student may feel the desire to some comparative law-classroom research on, say, the nature of 'tragic loss', or on 'the opacity of legal language' in law teachers. A student with a background in economics may feel the desire to re-work the famous invisible hand metaphor towards something like this: By pursuing his own questions, a student frequently promotes collective well-being more effectually than when she really intends to promote it – she is led by an invisible hand to render translucent the metaphors that are transparent to her teacher, metaphors that can hinder an authentic joint inquiry uniting the concerns of truth, beauty, and justice.

* * *

In *When Words Lose Their Meaning*, White offers this 'general' criterion for judging a variety of communities ('from the family to the nation and beyond': 'recognition of the equal value of other people'.⁵ Let us try to catch his drift as to what he means by this by attending to a specific application.

Jane Austen's *Emma*, in White's words, is 'a novel of education',⁶ in which the heroine moves from a 'disturbed language' in which she 'constitutes her self and her social world' to 'a condition of health and knowledge'.⁷ The opening pages of *Emma* tell us that Emma is the younger daughter of a 'most affectionate, indulgent father'. Her mother had died when she was very young, 'and her place had been supplied by an excellent woman as governess, who had fallen little short of a mother in affection.'⁸ The narrator goes on to give some details on the relationship between Emma and her governess, Miss Taylor:

⁵ *When Words Lose Their Meaning* 18.

⁶ Ibid 163.

⁷ Ibid 164.

Sixteen years had Miss Taylor been in Mr. Woodhouse's family, less a governess than a friend, very fond of both daughters, but particularly of Emma. Between them it was more the intimacy of sisters. Even before Miss Taylor had ceased to hold the nominal office of governess, the mildness of her temper had hardly allowed her to impose any restraint; and the shadow of authority being now long passed away, they had been living together as friend and friend very mutually attached, and Emma doing just what she liked; highly esteeming Miss Taylor's judgment, but directed chiefly by her own.⁹

What sense are we to make of that passage? Might we say that Miss Taylor and Emma (or, perhaps better, for the purpose of equal treatment, Miss Woodhouse) had been in a fundamental sense equals, 'living together as friend and friend very mutually attached'?

The passage just quoted is White's point of departure for a claim about a 'disturbed language':

The subject put before us here is friendship, especially its relation to 'affection' and 'fondness,' on the one side, and 'restraint' and 'authority' on the other. The language that defines the attachment of 'friend and friend' as 'Emma doing just what she liked' and that links 'affectionate' and 'indulgent' as practical synonyms is meant to represent Emma's way of thinking, and a highly defective language it is. Such utterances . . . would be impossible in the mouth of any speaker who really knew what he or she was saying; for we know that the term 'friendship' is not properly the equivalent of 'indulgence,' since it also includes discipline, correction, and the speaking of unwelcome truths. But Emma does not know this, nor does the reader know it yet as fully as he will; for on a first reading it is easy to slide over these terms, nearly all of which are positives, and to accept the language almost as one's own.¹⁰

What is 'wrong' with such language, White explains, 'is that it has no internal opposition, no tension to give it life and to make meaning possible.'¹¹ Put differently, the language lacks 'the contrasting other term that makes thought possible.'¹²

⁸ J Austen, *Emma* (1816; 1996) 1.

⁹ Ibid.

¹⁰ Ibid.

¹¹ *When Words Lose Their Meaning* 166.

¹² Ibid.

As the novel proceeds, White says, Emma gradually comes to develop a more complex way of thinking and talking about herself and others. Her education is formed in part through a series of painful encounters, and in part through her developing relationship with Mr. Knightly, a family friend. In his willingness to 'correct' Emma, a different sense of friendship is offered. After hearing from Mr. Knightly on how Emma ought to think and feel about Miss Taylor's transition to Mrs. Weston, White writes:

Here we are told in firm and stable terms something of what true friendship in such a case entails: honest acknowledgement of one's own loss and participation in the friend's greater gain. This is a discourse built on a Johnsonian 'but' – a word wholly impossible to the mind of the opening reverie. . . . Mr. Knightly's friendship is thus established at the outset as that of a teacher. As the text makes explicit, he alone is a good enough friend to Emma to correct her: he is 'one of the few people who could ever see faults in Emma Woodhouse, and the only one who ever told her of them.' . . . Throughout the text he will be her constant corrector, expressing approval and disapproval in many ways and on all sorts of occasions. Emma indeed internalizes him, responding in her thoughts to criticisms she imagines he would make.¹³

We might say that in some respects Mr. Knightly effectively holds the de facto office of Emma's governor. This is a relation of inequality. Yet the relation between the two is one of 'friendship'. Talking about equality here evidently is not going to be simple.

Emma and Mr. Knightly are involved in 'conversations', 'rational' and 'playful', to use the narrators terms for describing what Emma's father cannot 'meet her in' (terms that White includes in the title of his chapter). In these conversations, we can sense another side to Emma. She, suggests White, is much more than 'a single defective voice'.¹⁴ She has a 'set of capacities for thought and speech and life', a side of her that 'can be called on to correct' the disturbed side.¹⁵ It is through her conversations with Mr. Knightly that her 'contrasting modes of being' become 'in conscious opposition'.¹⁶ For White, 'much of the life of the novel lies in the development of what these

¹³ Ibid 168-69.

¹⁴ Ibid 167.

¹⁵ Ibid.

¹⁶ Ibid.

conversations mean.¹⁷ In particular, *Emma* will 'be only in part a novel of correction, in which Emma's distorted ways of speaking and being are broken down by experience; it is also a novel of change through affirmative experience.'¹⁸ White talks of this experience in terms which he has used to present his construct of the 'ideal reader': 'It is the version of herself that Emma becomes in her conversations with Mr. Knightly that enables her to experience the final blow of his apparent loss as she does: to see it clearly and to face it honestly.'¹⁹

Let us not concern ourselves with the details of this 'final blow'. Of present significance is White's discussion of the 'textual friendship':

Jane Austen's ideal of friendship is given meaning and definition not only in the relationship between Emma and Mr. Knightly but in the relationship that she as a writer establishes with her reader in this text. The textual community of *Emma* in fact directly parallels the imagined community between Emma and Mr. Knightly: it is educative in its concerns, it works by pleasure and conversation, and its central aim is to help the reader become an improved version of himself.

The analogy between Emma and the reader begins with the very act of reading, as we both try to observe things accurately and to understand what they mean. For as Emma must learn to 'read' her world if she is to judge and act and speak well within it, we must learn to read the text well if we are to understand what happens to us as readers. Like her, we are constantly trying to locate ourselves with respect to what we are told, to figure out what to respect and how to respond; like her, we are always asking what things mean, and we ask that question of the same things she does. . . .

Although we share her questions, we do not directly share Emma's experiences of error and correction. . . . We do not share Emma's point of view, nor do we enjoy a position of secure omniscience; instead, we experience the events of the text with a partial and incomplete intelligence, different from that of any of its characters; it is almost as if we were ourselves actors within it. Our task, like Emma's, is to read our way into understanding.

A part of this reading, as of all reading, is re-reading. Emma does this through her memory, going back over what she has observed and the way she interpreted it, trying to understand her mistakes, and this is what we do in our ordinary lives. But as readers of this text we can repeat the actual process of reading the text and so learn to see more and more

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid 169.

clearly what at first we saw awkwardly and dimly or missed entirely. This is a text that must indeed be reread to be read at all, for an essential part of the experience it offers the reader is the correction of his earlier misreadings, by which it teaches him or her to become the audience, the partner, that the text defines and requires.

In this sense the text engages its reader in a kind of conversation, like those between Emma and Mr. Knightly, in which at every clarification one feels recognized and rewarded with pleasure and knowledge. The reason the text offers its reader such continual freshness, such a sense of surprise and learning, is that one's sense of it, and of oneself, is always changing. At each discovery one finds oneself invited, as one who has *now* seen such-and-such a point, to ask how this clarification affects the rest of one's reading; this in turn leads to another set of questions and puzzles and clarifications; and so on. The experience is a little like taking a progressive series of tests, each of which is intelligible only when you have passed its predecessor. It is in some sense the same paragraph one reads, but each time one both sees it differently and feels differently addressed. One hears Jane Austen's voice in new ways, asking new questions, making new comments, and in the process one moves into an increasingly confident and intimate understanding of the text and its author. It is the movement of mind into harmony with mind that is responsible for the sense, shared by so many readers of Jane Austen, that one has a secretly privileged and personal relationship with her, a special kind of friendship; this sense is, for one who has read her well, literally true.²⁰

That passage offers much for 'surprise and learning', to speak from my own experience. When I first read it, I was not entirely persuaded that literary criticism – a seemingly strange activity of writing about writing – had much merit. 'What was the point?', I asked myself. I came back to the passage after my early readings of *The Legal Imagination*. In the process of re-reading the passage I could sense that I had had some initial prejudices against 'literature' and that they were problematic. (I was becoming alienated from one image of the world and tuning in to another.) In repeating the process of reading the text I could hear White's voice in new ways, and in the process of asking new questions and making new comments, I felt I was moving into an increasingly confident understanding of the text and its author, a movement that is the material of an attunement (*Attunement). It became clear to me that the textual community of White's *When Words Lose Their Meaning* (and of *The Legal Imagination*)

²⁰ Ibid 185-6.

directly parallels the textual community of *Emma*: it is educative in its concerns, it works by pleasure and conversation.

The word 'conversation' is a key word in White's equality talk (*Equality). Consider these fragments:

The central relationships in this novel, those between Emma and Mr. Knightly and between the author and the reader, are the conversational and educative friendships in which culture and be reconstituted and life given shape and meaning. . . . [T]he kind of conversation that Jane Austen defines and celebrates here rests ultimately on the recognition of another person, and that is the central idea of kindness as well: imaginative sympathy with the experience and circumstances of another, respect for his claims and autonomy. Kindness and conversation alike proceed from a perception of common humanity.²¹

Emma is not thought to be a political novel. In fact it has frequently been criticized for what some see as its unquestioning acceptance of an unjust social order, and it is certainly true that Jane Austen is not concerned with political questions of the usual sort: the best arrangement of institutions . . . But there is another sense in which it is deeply political for it invites you to ask: If I become the ideal reader this text defines, the version of myself it calls into being, what will I do, what will I be, when I turn to my own larger world and act within it? . . . Austen . . . makes the question about the larger world unavoidable for one who reads her properly, and, in addition, she suggests two modes of activity by which it can be addressed: what I have called 'kindness' and 'conversation.'²²

How are we to read White's reading? How does White define himself and his reader and the relation between them? As a partner in 'conversation'?

* * *

Susan Mann, as expressed in *The Universe and the Library* (1989), seems unable to imagine such a partner. Her reading draws on Umberto Eco's *The Name of the Rose* (1983), arguing 'that, like Jorge, James Boyd White establishes a locked Library.'²³ A sense of what she means by this may be caught in the following fragment:

²¹ Ibid 190.

²² Ibid 191.

²³ S Mann, 'The Universe and the Library: A Critique of James Boyd White as Writer and Reader' (1989) 41 *Stanford Law Review* 959, 971.

Judged by the standards of New Criticism, White is a gifted critic, and I do respect his skill. My point is not that White's reading is wrong, since I share the view of those who state that the basis of the modern hermeneutic is that there can be no single valid reading of a text. Rather I wish to demonstrate that both his choice of Austen as a subject of study and his reading of her work are products of his Library and that this Library systematically emphasizes the importance of linguistic and personal aspects of life over social and cultural ones.

As many Austen critics have explored, one of the central problems faced by Austen heroines is the need to find husbands with whom they can share a language of mutual concern and sincerity, a language similar to that which White sees as ideally characterizing legal relationships. . . . [F]ocusing on the creation of this language between Emma and Mr. Knightly, White obscures the effects of gender and social hierarchies that receive considerable attention in the text. His reading, while valid, is nevertheless partial; having abstracted the social text from the novel, it cannot easily support the general insight for our social-political life that White draws from it.

For each of his readings, White provides a 'Bibliography and Background' on the author. He . . . omits well-known works that place Austen in her social context and introduce her to unfamiliar readers. White also ignores the numerous accounts of Austen as a feminist or as a critic of the Regency society in which she lived. These omissions illustrate how White both limits his own Library and would like to dominate his reader's selection of hers.

White's interpretation of *Emma* similarly ignores the social and the gender-specific. . . . White's decision to focus on the linguistic and the relativistic and to ignore the religious, social, and economic aspects of the work provides an example, at the simplest level, of how an interpretation is less dictated by a text than a product of interpretive techniques with which one enters it. As Jorge sought to exclude the new, secular learning of the early Renaissance from his Library, so White's method of interpretation ensures that his Library will not include religious or socioeconomic aspects of the works he studies. With regard to these aspects of his exemplary texts, he is hostile — and so dominating — reader.

. . .

The public nature of life in *Emma* is social as well as religious. . . . Miss Bates's poverty produces her dependency, and so Emma's responsibility. . . . Mr. Knightly explains to Mr. Woodhouse the necessity of marriage for Miss Taylor, a companion of Emma's: '[Emma] knows how much the marriage is to Miss Taylor's advantage; she knows how very acceptable it must be at Miss Taylor's time of life to be settled in a home of her own, and how

important to her to be secure of a comfortable provision . . .’ This is the language of economic security, not sentiment.

Other examples of the effect of socioeconomic status abound in Austen’s work. Much of What Emma learns in the novel is the power of economic and social roles in her world and the realities of their impact on her. This is a lesson more in accepting other’s judgments than it is in the kind of independence posited by White.

. . .

This social and economic reality that Austen reveals in *Emma* casts doubts on White’s overarching claim that the novel is ‘deeply political’ and instructs the reader to seek conversation as the model of proper public life. . . . [T]he public world implied by *Emma* would replicate the type of conversations that actually do occur in the novel: fragmented, divisive, domineering, channeled by social conventions. The rare conversations in the novel in which the participants display equality and respect for individual worth indicate that these attributes are the virtues of intimacy between social equals like Emma and Mr. Knightly. If anything, Austen’s fiction is testimony to the difficulty of establishing all-inclusive public conversations. . . .

Although White claims to ask each text the questions that it itself specifically generates, his interpretations always ignore questions of gender and the effects of socio-economic status, even where, as here, the text specifically engages them. Thus, while White describes his method as if it were an author-based method of reading . . . , it in fact dominates the texts that he reads. White asks the same questions of Austen as of Swift or of Thucydides; and each text gives him similar answers. White . . . finds that these texts discuss the constitution of self, language, and community. White has chosen his ostensible Library of sources carefully, so that each provides some support for his thesis that each text discusses the proper constitution of self, language, and community. But his method of reading is too dominating to permit them to describe this constitution as part of specific political, religious, and social contexts.²⁴

For Mann, it seems just to say, White does not practice his preaching about the equal value of other people, not the least to the extent that he ‘dominates’ both the text that he reads and his reader.

Is Mann justly reading White? Let me begin with the opening paragraph of the passage just quoted. I am surprised to hear the claim that White ‘emphasizes the importance of linguistic and personal aspects of life over social and cultural ones.’ By

my reading (*Integration), White imagines 'linguistic and personal aspects of life' to be entwined with 'social and cultural ones' in a manner that negates any sense of a possible separateness. How can Mann claim otherwise? She imagines White as 'having abstracted the social text from the novel'. Her claim is problematic. It would be more accurate to say that White has 'abstracted the social text' that is of particular interest to her. That which she calls 'social' is subject to selective perception, and she would do well to say so, if only to express doubt about what she might be leaving out. That which she leaves out might be a part of White's 'social'.

Now to the second paragraph. I would hesitate to say that 'White obscures the effects of gender and social hierarchies that receive considerable attention in the text.' Perhaps more fitting is this: White is not interested in the effects of gender and social hierarchies for the simple reason that he has questions and purposes that are not related to them. Of course his reading is 'partial', for every reading is in a sense partial. Mann seems to use that word with a tone that may be problematic, as I suggest in a moment.

Concerning the 'Bibliography and Background' talked about in the third paragraph. What is included here is obviously included for certain *purposes*. Existential scarcity means that White has to place 'limits' on 'his own Library'. In short, 'omissions' are inevitable. I can make no connection between the existence of 'omissions' and a supposed will 'to dominate his reader's selection' of her own 'Library'. Mann would have done well to elaborate on what she means by 'dominate', so the word would lose its capital letter and not risk being imagined as a hostile watchword. To the extent that she does not explain and justify her key word of judgment, I would say that she fails to do justice to White, for the word becomes little more than a sledgehammer. Is not Mann's language 'disturbed' in the same way that Emma's is at the outset of Austen's novel? Concerning Mann's word 'dominate', where is the contrasting other term that makes thought possible?

The kind of equality that is of central importance to White is *rhetorical* equality, not 'economic'. Rhetorical equality is achieved through the kind of 'conversation' that he seeks to define and celebrate. Mann's work detailing patterns of economic inequality would serve no purpose for White. For him, by my reading, *the most important*

²⁴ Ibid 981-90.

‘conversation’ ‘in’ *Emma* is the conversation between Austen and her reader. Mann seems to be preoccupied with her own questions to consider it fitting to say anything about this particular conversation. In a sense, White’s attention on the author-reader relation is what makes his approach an ‘author-based method of reading’. That his method ‘dominates the text that he reads’ is not a vice, as Mann would have her reader imagine, but a virtue.

In short, Mann pays no attention to the author-reader relation on which White centers his attention, a relation that has nothing to do with ‘socio-economic’ inequality. For the purposes of discussing the author-reader relation White draws an analogy with the rhetorical relations between heroine and the hero. Their ‘economic’ situation is simply not relevant. Mann needs to attend to the economics of her attention in order to do justice to White.

* * *

Dissatisfied with White’s inattention to matters of socio-economic inequality, Mann drew this comparison:

While White’s human beings constantly create communities with one another . . . , his emphasis on their autonomy and equality makes them almost as atomistic and one-dimensional as those imagined by Richard A. Posner.²⁵

Let us not quibble with the word ‘almost’. The comparison seems to me to be misdirected, given that White’s ‘autonomy and equality’ is associated with the ‘rhetorical’ realm as opposed to the ‘economic’, which is Posner’s concern.

One would do well to be careful when setting ‘the rhetorical’ and ‘the economic’ in opposition, for in some circumstances it may be fitting to integrate them. Integrating them is precisely what Posner has *never* done, in part because of the way he imagines ‘the rhetorical’ (*Rhetoric). Consider, for example, these introductory remarks from Posner’s *Economic Analysis of Law* (1972):

Economics turns out to be a powerful tool of normative analysis of law and legal institutions – a source of criticism and reform. . . . The positive role – that of explaining the rules and

²⁵ Ibid 979.

outcomes in the legal system as they are – is . . . important. As we shall see, many areas of the law, especially the great common law fields of property, torts, and contracts, bear the stamp of economic reasoning. Few legal opinions, to be sure, contain explicit references to economic concepts and few judges have substantial background in economics. But the true grounds of decision are often concealed rather than illuminated by the characteristic rhetoric of judicial opinions. Indeed, legal education consists primarily of learning to dig beneath the rhetorical surface to find those grounds. It is an advantage of economic analysis rather than a drawback that it does not analyze cases in the conceptual modes employed in the opinions themselves.²⁶

It is problematic to imagine that one can ‘dig beneath the rhetorical surface’ of judicial opinions. There is no escaping ‘rhetoric’. Posner’s use of the language of ‘concepts’ suggests that he is committed to imagining a reality (‘economic’) that exists apart from language, which is imagined to be a merely a tool for point to objects ‘out there’ in the world, beyond culture (*Concepts).

Posner’s own ‘rhetoric’ may be more readily sensed if we place what he says about ‘economics’ next to what White says about it in *Justice as Translation*, in which he offers a critique of ‘the language of economics’. White here claims ‘that economics, like law, can be examined as a form of life and language, or what I call a culture.’²⁷ At the outset he directs attention to his use of the word ‘economics’:

To say that I shall speak about ‘economics’ may be somewhat misleading, for I shall actually focus attention mainly on one branch of it, namely microeconomics of the neoclassical kind, especially upon the strong version associated with the ‘Chicago School.’ This is the economics in which the ‘Law and Economics’ movement originated, and it is an important mode of thought among other economists as well. . . . To use ‘economics’ to refer to this particular branch of it, as I do, may be something of a solecism, but for a lawyer today it is an easy and perhaps forgivable one, since this is the terminology generally used by those who have been most energetic, and successful, in recommending this mode of thought to us.²⁸

White here tells his reader that he is carrying out a reduction of some kind in his use of the word ‘economics’, but doing so for a particular reason, namely to talk on the terms

²⁶ R A Posner, *Economic Analysis of Law* (1972) 6.

²⁷ *Justice as Translation* 46.

²⁸ *Ibid* 46.

of those with whom he is engaging. Imagine Posner's *Economic Analysis of Law* beginning with a significant terminological qualification regarding the word 'economic'. At the very least, his reader would be alerted to the existence of other possible uses of the word and thus to a loss of some kind and to the need to make judgments about this loss. Posner's project, however, is inconsistent with such a beginning, for he would have the word 'economic' point to some objective phenomenon that is 'beneath the rhetorical surface' of an utterance.

White does not stop with a single terminological qualification. He sees fit to reiterate several pages later on:

Here let me stress again that what I call 'economics' in the pages that follow is really only one form of it, and that form as practiced by those who are most eager to see it universalized as a mode of thought. This means that at least those economists who feel that they can distinguish what they do from what I portray will think that my account has an exaggerated or caricatured quality. This is consistent with my purposes, however, for I am not trying to give a full account of a whole field but to identify certain pressures or forces in economic discourse with which its practitioners have to come to terms. For these purposes, the form of economic I have chosen has the great merit of a kind of extremism that presents these forces and pressures in highly clarified form. My object here is to bring to the surface, where they can be seen and studied, certain attitudes and assumptions that are latent but obscured in much of our public talk; that are explicitly at work in most economics, though in a qualified form; and that are made visible and accessible in the kind of microeconomics of which I shall speak.²⁹

White is *not* doing a *survey* of some kind, involving 'a full account of a whole field'. He is engaged in the activity of 'cultural criticism', to use the terms of the subtitle of his book, and his aim is 'to identify certain pressures or forces in economic discourse'.

White might have done well to keep *reiterating* what he is driving at, for at least one reader failed to catch his drift. In a review of *Justice as Translation*, Mark Tushnet said this on 'the defects in White's criticisms of "the language and culture of economics"':

Perhaps because he does not confront real texts written by real people, White constructs a series of straw men to criticize. Undoubtedly, some people do hold the views that White

criticizes, but those views are not economics as a reified entity, as White supposes; they are, instead, a particularly ideologically charged version of economics.³⁰

Tushnet, I submit, is a careless reader. White is careful at the outset about identifying the 'one branch' of economics that he was concerned with. He stated *why* he confined himself to this branch: one of his aims is to talk about 'culture' in relation to 'the language of economics'. It is such talk that proponents of 'economics of' leave out. For White, it is this omission that ultimately makes people such as Posner and his 'ideologically charged' colleagues guilty of imperialism. Tushnet failed to attend to White's explicit activity.

The 'ideologically charged version of economics' neglects certain forms of inequality. Let White speak:

The institution of the market is celebrated by its proponents because in their view it is democratic—each person brings to the market his own values and can 'maximize' them his own way—and because it is creative and open, leaving the widest room for individual choice and action. . . . The market is further justified, when such justification is thought necessary, in either of two conflicting ways. The first is to say that the market is good because it promotes efficiency, that is to say, it maximizes the 'welfare' of all participants in the process. It does this by definition, because each person participates in the process only because he thinks he gets more that way than he would any other way, and who are we to tell him differently? . . . One obvious trouble with this is that it . . . takes for granted . . . the existing distributions . . . of wealth, capacity, and entitlement, which it has not way of criticizing. Yet these may of course be eminently criticizable. . . .

The second ground upon which the market is justified is that . . . of its fairness. This claim has two version: the first rests upon the ethical standing of voluntary action and holds that the results of the market process are justified with respect to every actors because the choices by which it works are voluntary. The second version becomes the affirmative celebration of autonomy or liberty: whether or not it is efficient, the market is good because it gives the widest possible range to freedom of choice and action. . . . The obvious trouble with this line of defense . . . is that it assumes that all exchanges are for all actors equally voluntary and equally expressive of autonomy, a position that common sense denies.

²⁹ Ibid 50-51.

³⁰ Tushnet, 'Translation as Argument', (1990) 32 *William and Mary Law Review* 105, 120 (footnote omitted)

Let us begin with the 'voluntariness' of the exchanges studies, which is essential both to the 'welfare' and to the 'autonomy' justifications. It is one thing to construct an analytic model that assumes voluntary choice as a way of working out what the consequences of such an exchange system would be if it existed, and for those purposes to write off constraints on conduct as one writes off abnormal incompetence and so forth. It is quite another to say that all human behavior not obviously coerced should be regarded as having the ethical or moral status of wholly free, autonomous action, which is entitled to our respect if anything is. Obviously most human choice is greatly constrained, some of it cripplingly so. It may be true that I sell my labor for the minimum wage, working at a noisy, ugly, demeaning, boring, and perhaps dangerous, job, but only because that is the best I can do. I do not want *that* choice to be given the sort of standing that an investor's choice to go for stocks rather than bonds, or my own choice to spend Saturday afternoon on the river or at the museum, should be given.

Not only are we differently situated financially, in ways that deeply affect the voluntariness of our choices; we are unequally situated psychologically as well. Some of us are much freer from conflicts, compulsions, and similar afflictions than others are. . . .

To reduce the ideas of voluntary action, autonomy, and liberty to mere freedom from restraint, or, even more narrowly, to freedom from governmental restraint, as these justifications do, deeply impoverishes our thought. For us political liberty has not meant merely freedom from restraint but enablement or capacitation, and this is always social and communal in character. . . .

The incapacity of economics to reflect degrees of voluntariness is actually a particular instance of a larger feature of the discourse, one that derives from its quasi-mathematical character. Its use of labels is inherently binary. One either is or is not 'competent,' an action is or is not 'voluntary,' because the formulas that are the stuff of economic thought require that a particular person, objet, or event either be, or not be, an 'A' or a 'B' or whatever other label is used. . . . Of course, our actual experience is not of binary or dichotomous phenomena but of degree and of change. Our ordinary language, in its imprecisions and overlappings, reflects that fact. But none of this can be reflected in the language of economics.³¹

White's claims here will be familiar to readers of Susan Mann's criticism of White's reading of Austen's *Emma*. The kind of socio-economic inequality that Mann considers White to be insensitive to is at the heart of his critique of 'the language of economics'.

³¹ *Justice as Translation* 62-65.

Conventional economics gives particular attention to choice within 'opportunity sets' and ignores the factors and forces shaping opportunity sets and the 'preferences' that choice responds to. White appreciates that the conclusions of such economics relating to 'efficiency' and 'freedom' are not independent of its premises. He takes issue with the value of the premises as they concern the *purpose(s)* of law making. Proponents of the economics that White criticizes talk about the 'autonomy' of the individual, but they do not seem to sense that they themselves are engaged in a relation with their reader in which autonomy is itself an issue. White directs attention to a linguistic prison that they put their reader in, a prison that permits no talk of 'degree' and 'change'. White invites his reader to resist 'the language of economics', in part by granting authority to 'ordinary language'.

* * *

White's concern with 'degrees of voluntariness' is at the heart of John Commons' economics, an economics that grew in part from an inquiry into the role of government in labour disputes. Let us take in a fragment of his judicial criticism in *Legal Foundations of Capitalism* (1924), which offers a challenge to then dominant laissez-faire orientation of the United States Supreme Court.

One case of central importance in Commons' book is *Adair v United States* (1908),³² which concerned the Erdman Act of 1908. The Act made it a criminal offence, punishable with fine or imprisonment, for any interstate carrier or any of its agents to discharge or otherwise discriminate against an employee because of their membership in a union. It thus prohibited making what was commonly known as a 'yellow dog' contract a condition of employment. The Act meant that the employers had no right to require employees to resign their union membership as a condition of employment. The primary purpose of the Act was to prevent a repetition of the Pullman strikes that had been of considerable agitation to various commercial interests throughout the country. As the Secretary of the Interstate Commerce Commission remarked on the Act in question:

³² *Adair v United States* 208 US 161 (1908).

With the corporations as employers, on one side, and the organizations of railway employees, on the other, there will be a measure of equality of power and force which will surely bring about the essential requisites of friendly relation, respect, consideration, and forbearance. It has been shown before the labor commission in England that, where the associations are strong enough to command the respect of their employers, the relations between employer and employee seem most amicable.³³

‘Power and force’, however, are subject to selective perception, which is channeled by language and belief.

In 1906 William Adair, an agent of the Louisville & Nashville Railroad Company, discharged Oscar Copping, an employee of the company, because of his membership in the Order of Locomotive Firemen. Suit was brought against Adair, and he was convicted for violating the statute. Adair appealed. The Supreme Court divided. Justice Harlan, for the majority, declared the Act unconstitutional. The main ground was that the Act ‘interfered’ with the liberty of contract both of the employer and of the worker, and was thus a violation of the Fifth Amendment:

It was the right of the defendant to prescribe the terms upon which the services of Copping would be accepted, and it was the right of Copping to become or not, as he chose, an employee of the railroad company upon the terms offered to him. . . . The right of a person to sell his labor upon such terms as he deems proper is, in essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. In all such particulars the employer and employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can justify in a free land.³⁴

The Court’s veto of the Act, Commons claimed, was built on ‘John Locke’s definition of the will.’ This will is a ‘will-in-vacuo’, a ‘mere faculty of acting and not-acting.’³⁵ This will is manifest in Harlan’s assertion that ‘the employer and employee

³³ Quoted by Justice McKenna, *ibid*, 187-88.

³⁴ Adair, 172-73.

³⁵ J R Commons, *Legal Foundations of Capitalism* (1924) 69.

have equality of right'. The equality of right is, Commons stated, 'an equal right to choose between acting and not acting.'³⁶ He elaborates:

The working man had the right to choose between working for the corporation and not working for it. The corporation had the equal right to choose between employing the man and not employing him. The two *rights* on the two sides of the transaction are exactly equal. There was 'equality of right,' because each had the equal right to choose between acting and not acting, between an 'act' and an 'omission.'³⁷

But, as Commons points out, the 'will-in-vacuo' abstracts from the structure of the interaction of wills of the employer and the employee – the precise issue in dispute. The interaction requires attention on what Commons call the 'will in action' – one 'continually overcoming resistance and choosing between different degrees of resistance, in actual space and time'.³⁸ Put differently:

For the will is not an empty choosing between doing and not doing, but between different degrees of power in doing one thing instead of another. The will cannot choose nothing – it must choose something in this world of scarcity – and it chooses the next best alternative. . . . The will chooses between opportunities, and opportunities are held and withheld by other wills which are choosing between opportunities, and these opportunities are limited by principles of scarcity.³⁹

For Commons, the issue in the *Adair* case was the pattern of relative withholding capacity. This concerned the pattern of liberty and exposure. The Act in question sought to clothe the employees with the liberty to join a union without fear of discharge. This would expose the employer to damage on account of the possible exercise of that liberty. The damage would consist of the greater bargaining power of employees. Without the Act, the employees were exposed to discharge if they did not forego their 'right' to belong to a union. In the latter situation, the relative bargaining power could not in any sense be deemed 'equal'. As Commons put it: 'If the corporation has 10,000 employees it loses only one ten thousandth part of its working

³⁶ Ibid 71.

³⁷ Ibid.

³⁸ Ibid 69.

³⁹ Ibid 303.

force if it chooses to not-employ the man, and cannot find an alternative man. But the man loses 100 per cent of his job if he chooses to not-work and cannot find an alternative employer.⁴⁰ Commons added: 'When the laborer and his family could escape to other employers, before the incoming of these corporations, the doctrine of equality had some leeway; but when whole economic governments controlled the opportunities for employment of specialized workmen fitted mainly for that kind of employment, then the nation by these decisions of the courts was confronted with a conflict of inequality of power between great corporations and unorganized individuals.'⁴¹ The majority of the Court in the *Adair* case, however, was blind to the necessity of choice over the pattern of relative withholding power, and enshrined the pattern of power favouring the employers.

Commons implicitly approved Justice Holmes' dissent, which insisted that the statute 'simply prohibits the more powerful party to exact certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds against those already employed.' Holmes continued:

Where there is, or generally is believed to be, an important ground or public policy for restraint, the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued. It cannot be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, might be deemed an important point of policy, and I think it impossible to say that Congress might not reasonably think that the provision in question would help a good deal to carry its policy along.⁴²

To that we might say that just as voluntariness is subject to selective perception, so too is 'the Constitution'.

* * *

In the early 1960s, when he was thinking about going to law school, White went to hear a moot court argument involving a question of state tax and administrative law. The experience, he says 'to the student' in *The Legal Imagination*, 'probably closed the

⁴⁰ Ibid 72.

⁴¹ John R Commons, *The Economics of Collective Action* (1950) 268-9.

⁴² *Adair*, op cit, 191.

decision' for him.⁴³ It was an experience that ran counter to his expectation. In some autobiographical details in *The Edge of Meaning*, he tells us:

I had expected this to be resolved in a technical and uninteresting manner, by a dry-as-dust reading of some rules found in an old book with yellowing pages, but I quickly saw that instead it required argument about the most interesting and important things: about the meaning of language, including the way language means; about the purposes of the tax laws; about the relations between the citizen and government; about the kind of respect that one agency of government owes to judgments reached by another; and so on. The argument always had justice—and whatever justice could be made to mean—as its subject, and it seemed to me to involve everything, to call upon every capacity of mind and imagination. And it had to be shaped, in time as spoken, on the page as written, and directed to a particular audience or a set of audiences; in those ways at least, perhaps more, it had to be a work of art. I was entranced, and went back to hear other arguments, struggling to follow them, imagining myself making them.

Here was a profession that was set up on the idea that each side would have equal time to talk; that the judge or other audience would hear you out; that you could make whatever arguments seemed to you right; that you could do whatever you could to reformulate the language to make it say the truth from your perspective; and to do all this in the interests of people who could not adequately speak for themselves.⁴⁴

White would go on to stress throughout his writings that what is commonly objectified as The Law is not simply a set of rules but a collaborative enterprise of making meaning, an 'art' combining what we might call relativism, insofar as we can talk about 'truth from your perspective', and idealism, to the extent that we have a place to pursue 'justice'. Also concerning idealism, this place takes our 'we' seriously, for 'each side would have equal time to talk'. For White, this is a non-trivial and much neglected form of equality. Throughout his work he directs attention to this form as a place for some remarkable opportunities for thought and expression.

In *Acts of Hope*, as mentioned in the Introduction to this Thesis, White engages with Nelson Mandela's statement from the dock in the Rivonia Trial. His engagement includes this equality talk:

⁴³ *The Legal Imagination* xxxiii.

The cultural force of the ideals of democracy and law to which he appeals is demonstrated . . . by the government's own reluctance to be seen to abandon them entirely. The condition of Mandela's speech is a public trial, presided over by a judge and attended by journalists. The government could simply have murdered him, or tried him in private, or turned the proceedings into a show trial. But they did not, and their decision had consequences against their immediate interest, for it enabled Mandela to speak and be heard. The trial created a moment of rhetorical equality between state and accused, and as such enacted a political value inconsistent with the regime of oppression of which it was a part. To admit such a hearing into one's system is to scatter seeds of possibility whose growth the government cannot entirely control.⁴⁵

To the extent that the word 'rhetorical' is commonly thought to point to some kind of contemptible trick with words, frequently employed by politicians and advertisers, White might have done well to come up with a better name. However, our encounter with the word here may persuade us to join White in trying to contribute to its rehabilitation (*Rhetoric).

Whilst the decision to permit 'a moment of rhetorical equality between state and accused' may have been against the government's 'immediate interest', it may have been in their long-term interest:

As with Socrates' *Apology*, the fact that this speech is made by a person threatened with the death penalty, justifying his life against unjust charges, gives it extraordinary standing and power. When I first read this speech, many years ago, Mandela was in prison, presumably for the rest of his life. Almost as much as if he had in fact been killed—as Socrates was and he expected to be—these were his last words. In them the justification of his life depends, as he says, ultimately upon a vision or an ideal, a sense of what South Africa could and should be like: certainly not upon what it is. It is for an imagined possibility that he risks death, just as Socrates did, for the city or the country as it might become; for a sense of possibility that he creates in his writing, which can be made real only in the lives of others. In this sense the creation of authority here is indeed an act of hope.⁴⁶

⁴⁴ *The Edge of Meaning* 219.

⁴⁵ *Acts of Hope* 293-94.

⁴⁶ *Ibid* 294.

Along with the word 'rhetorical', we can be sure that through his writing White hopes his reader will consider re-placing 'imagined' in her imagination. The 'imagined' need not be, as it commonly is, opposed to the 'real'. As White suggests, we have much to learn from Mandela about the power of the 'imagined' for transforming the 'ideal' into the real. When it comes to talking about 'equality' as an ideal, we will do well to remember the hearing that Mandela was given, lest, for example, 'wealth maximization' (à la Richard Posner) is eventually adopted as an ideal for transformative constitutionalism (*Listening).

Experience

In *The Edge of Meaning* engages with a series of diverse works that range widely, including Homer's *Odyssey*, Plato's *Phaedrus*, the paintings of Jan Vermeer, Henry Thoreau's *Walden*, Mark Twain's *Huckleberry Finn*, and a modern law case involving the practice of school prayers. One reason for this diversity is to help White in his pursuit of 'a way of imagining life as a whole, on which our own action and thought and speech, our own relations with others, can sensibly and effectively be based.'¹ For White, our 'deepest question' as human beings 'is whether we can find, or make, a way of imagining the self and the world and others within it that will fit with our experience—enable us to have an experience—in such a way as to make possible coherent and valuable forms of speech and thought and action.'² The principal aim of *The Edge of Meaning* is to 'focus attention' on that question, 'showing how certain writers have addressed it and made it available to us, and in this way to make it the object of thought.'³ For the purpose of tuning in to White's use of the word 'experience', we will engage with his reading of *Huckleberry Finn*, a novel that has a significant place in *The Legal Imagination*.

Some preliminary remarks about this place may be helpful here. In *The Edge of Meaning*, White offers a collection of autobiographical reflections, one of which concerns his freshman year at Amherst College (*Questioning). The composition course, English 1-2, 'was the most powerful intellectual experience of my life, changing not only my sense of writing but of the possibilities of life itself.'⁴ (Theodore Baird, to whom White dedicated *The Legal Imagination*, directed the course.) When White started teaching in 1967 (at the University of Colorado), he set 'to give law students

¹ *The Edge of Meaning* 2.

² *Ibid* 4.

³ *Ibid*.

⁴ *Ibid* 129.

something like the experience I had at college'.⁵ White says this about his course 'The Nature of Legal Expression':

One hope of the course was to help my students see that the resources and limits of their languages, legal and other, could become the subject of conscious attention; and that if this happened, it might become imaginable that they should be to some degree in control of their languages, rather than the other way round. This in turn held out the possibility that the life of the lawyer could be imagined as one of literary and ethical art, a drama of the first significance. I hoped that some of the students at least would come to see the practice of law as offering the opportunity for writing in the best and fullest sense of the term – as original and authentic action with language and with others.⁶

Languages can be imagined as patterns of capacities and constraints for imagining the self and others. A 'hope'-full White senses value in imagining languages this way and in helping students to do the same, not the least to 'control' these languages. Such control might be imagined as the material of creating an 'authentic' self. (This control should be a central concern of those who seek to promote a vibrant 'transformative constitutionalism' in South Africa.) An awareness of the possibility of imaginatively creating a self gives rise to the question, What kind of self do 'I' want to become? Or, Which 'I' is more *becoming* of 'me'? Imagine failing to ask that last question. Imagine a teacher who fails to invite his students to ask it. What might become of a student who fails to make the capacities and constraints of their languages 'the subject of conscious attention'? Might she become imprisoned by certain values that are institutionalized in it? Will she be asleep to the extent that she fails to attend to the forces that shape her attention? White evidently would have his students repeatedly pay attention to 'attention' (*Attention). To the extent that that which we call 'experience' is influenced by habits of attention,⁷ his course invited students to take experience seriously.

The first chapter of *The Legal Imagination* begins with a section titled 'Learning the Language of the Law'. White suggests that 'the legal language system' is more than 'a technical language': 'we can talk about the legal language system . . . to include not

⁵ J B White, 'Why I Write' (1996) 53 *Washington & Lee Law Review* 1021, 1031.

⁶ Ibid 1032.

⁷ Here I echo William James: 'What is called our "experience" is almost entirely determined by our habits of attention.' That sentence is the epigraph to *Justice as Translation*.

only peculiar and technical phrases but habits of thought and conditions of mind, for it is language that demonstrates the condition of the imagination.’⁸ This approach opens up lines of inquiry, including matters involving inside and ‘outside’ orientation:

Is being a lawyer something you can put on and take off like a suit of clothes, or does it somehow change you beyond repair? Who is in control of whatever process of change goes on, who determines what you gain or lose? . . . Your question, which the course as a whole is meant to elaborate, is this: how will you, you personally, as an independent mind, respond to and attempt to control the pressure of your training in the law?⁹

What is meant when your friend at the cocktail party calls you ‘legalistic’ and gives up in disgust? Can you stand outside the legal language system and look at it? Can you stand far enough back from your legal education to ask, ‘What am I becoming?’¹⁰

Those questions can be read as an invitation to begin inquiring into the way we imagine not just ‘legal language’ but other languages too.¹¹ (The ‘becoming’ question could have been particularly subversive if asked in a law school in South Africa during the apartheid order.) To assist his reader in engaging with the questions, White offers a passage from Twain’s novel along with a series of questions relating to the passage. We will come to the questions later.

* * *

In 1895, fifteen years after *Huckleberry Finn* was first published, Samuel Clemens, more commonly known as Mark Twain, wrote the following notes relating to the novel for a lecture on ethics:

Next, I should exploit the proposition that in a crucial moral emergency a sound heart is a safer guide than an ill-trained conscience. I sh’d support this doctrine with a chapter from a book of mine where a sound heart and a deformed conscience come into collision and conscience suffers defeat. Two persons figure in this chapter: Jim, a middle-aged slave, and Huck Finn, a boy of 14, . . . bosom friends, drawn together by a community of misfortune.

⁸ *The Legal Imagination* 8.

⁹ *Ibid* 9.

¹⁰ *Ibid* 10.

... In those slave-holding days the whole community was agreed as to one thing – the awful sacredness of slave property. To help and steal a horse or a cow was a low crime, but to help a hunted slave was a much baser crime, and carried with it a stain, a moral smirch which nothing could wipe away. That this sentiment should exist among slave-holders is comprehensible – there were good commercial reasons for it – but that it should exist among the paupers ... and in a passionate and uncompromising form, it not in our remote day realizable. It seemed natural enough to me then; natural enough that Huck and his father the worthless loafer should feel and approve it, though it seems now absurd. It shows that that strange thing, the conscience – that unerring monitor – can be trained to approve any wild thing you want to approve if you begin its education early and stick to it.¹²

The novel offers an education about ‘the conscience’ and ‘its education’, an education for lawyers and non-lawyers alike. The novel offers the experience of inhabiting a world in which the ‘slave as property’ metaphor is as ‘natural’ as breathing, a world that becomes full of tension when Huck and hunted slave Jim become ‘bosom friends’. The tension might stimulate this question: What is ‘the conscience’? Also, what kind of experience might lead one to ask the question? What can make a familiar ‘thing’ become ‘strange’, and thus the subject of conscious attention?

White’s reading centers on the ‘crucial moral emergency’, on what White considers to be ‘one of the high points of all literature, the moment at which Huck tries to turn Jim in to the slave hunters, finds he cannot do it, and reveals at the same time that he has no adequate language in which to describe or explain what he has chosen to do.’¹³ The inexpressible has much to suggest. Let us try to catch ‘the edge of meaning’.

White’s central question is this: ‘How is it that Huck is able to resist or transcend his culture as successfully as he does?’¹⁴ White begins a response to that question by turning to Huck’s lifelong experience of marginality:

Huck ... is both of town and its values, and not of it, living sometimes with the widow, sometimes with Pap in the woods. He is in this sense bicultural, and can use his experience of one world to criticize his experience of the other. Thus practices that are so familiar as to

¹¹ Economics teacher Dawson, on first reading the question, began to imagine asking similar questions in the economics classroom, especially the ‘gain or lose’ question.

¹² Quoted in W Blair, *Mark Twain & Huck Finn* (1960) 143-4.

¹³ *The Edge of Meaning* 26.

¹⁴ *Ibid* 35.

be beyond question to those in town—such as prayer, or asking a blessing before eating, or regular bathing—to Huck seem odd, and thus to call for thought and explanation. As Achilles in the *Iliad* becomes a cultural critic almost against his will, by finding himself forced to the margins of his world, Huck begins in such a place, from which a kind of criticism is natural, not surprising.¹⁵

Such is the power of ‘place’, or better *no* place, save ‘the margins of the world’. In having no stable place in a community, some of community’s ‘values’ may not as firmly impounded (as habits) in Huck as they otherwise would be. To the extent that those values are unworthy of acceptance, this could be a blessing.

In being of no fixed place, Huck has developed some of his own unique habitual modes of thought:

The irresolvable inconsistencies between his two worlds thus lead him to develop his habit of turning to his own experience, confused and untutored though it is, as the only possible standard of judgment. This practice naturally generates a mixture of error, superstition, and accurate perception, and he, naturally enough, does not know which is which. But to do this at all he must be resolutely, sometimes devastatingly, honest with himself, both in his perceptions and in his accounts of them. Although his marginality does not give him a firm place to stand, then, it does teach him to focus on his own experience, however flawed it may be, as a mode of thought and reflection. And while the conflicts between his two worlds do not reach the issues of race and slavery, the habit of mind and attention they stimulate will ultimately do so.¹⁶

Whatever character flaws Huck might have, he cannot be accused of lacking a self worthy of the name. Efforts by economists to give *Homo economicus* some flesh and blood could begin with Huck as a model. Key qualities would include: (1) a ‘habit of turning to his own experience . . . as the only possible standard of judgment’; and (2) ‘honest with himself’. How is an economist to judge this proposal? Turn to their own experience? Which self within her- or ‘himself’ needs to be ‘honest’?

Twain’s novel begins with Huck up against the ‘sivilizing’ pressures from his foster mother, Widow Douglas, and from her sister, Miss Watson. These pressures meet

¹⁵ Ibid.

¹⁶ Ibid 37.

further pressures when Huck's abusive father Pap, who seems to be proud of being illiterate, comes back into Huck's life:

'Starchy clothes – very. You think you're a good deal of a big-bug, *don't* you?'

'Maybe I am, maybe I ain't,' I says.

'Don't you give me none o' your lip,' says he. 'You've put on considerable many frills since I've been away. I'll take you down a peg before I get done with you. You're educated, too, they say; can read and write. You think you're better'n your father, now, don't you, because he can't? I'll take it out of you. . . . And looky here – you drop that school, you hear? . . . Your mother couldn't read, and she couldn't write, nuther, before she died. None of the family couldn't, before *they* died. I can't; and here you're a-swelling yourself up like this. I ain't the man to stand it – you hear? Say – lemme hear you read.'

I took up a book and begun something about General Washington and the wars. When I'd read about a half a minute, he fetched the book a whack with his hand and knocked it across the house. He says:

'It's so. You can do it. I had my doubts when you told me. Now looky here; you stop that putting on frills. I won't have it. I'll lay for you, my smarty; and if I catch you about that school I'll tan you good. First you know you'll get religion, too. I never see such a son.'¹⁷

Pap will soon go on to 'tan' Huck 'good', so 'good' in fact that Huck comes close to death. This relationship is part of the 'misfortune' which contributes to the formation of Huck and Jim's community of two.

Huck runs away and soon finds himself running with Jim. Jim is 'owned' by Miss Watson, and thus is connected with Huck from the outset of the novel. The connection is a loose one, not the least because of the language of race, which includes the word 'nigger', flowing through the community in which Huck is a member. Something of the social attitudes with which Huck has grown up are suggested in these words from his father:

Oh, yes, this is a wonderful govment, wonderful. Why, looky here. There was a free nigger there, from Ohio; a mulatter, most as white as a white man. He had the whitest shirt on you ever see, too, and the shiniest hat; and there ain't a man in that town that's got as fine clothes as what he had; and he had a gold watch and chain, and a silver-headed cane – the awfulest

¹⁷ M Twain, *The Adventures of Huckleberry Finn* (1884; 1985 – Penguin Classics) 69-70.

old gray-headed nabob in the State. And what do you think? they said he was a p'fessor in a college, and could talk all kinds of languages, and knowed everything. And that ain't the wust. They said he could *vote*, when he was at home. Well, that let me out. Thinks I, what is the country a-coming to? . . . And to see the cool way of that nigger – why, he wouldn't a give me the road if I hadn't shoved him out o' the way. I says to the people, why ain't this nigger put up at auction and sold? – that's what I want to know.¹⁸

As Huck grew up he grew into this language of racism, which contributed to the formation of his identity. This language, like all languages, can be imagined as a pattern of habits of thought and feeling, which structures experiences of the world, and of the self and others in it. The kind of character Huck becomes can be talked about in terms of his interchange with this and other languages that flow through him.

Chance brings Huck and Jim together on Jackson's Island, from where they make their way down the Mississippi River together on a raft. Their relationship quickly begins to deepen:

. . . We laid off all the afternoon in the woods talking, and me reading the books, and having a general good time. I told Jim all about what happened inside the wreck, and at the ferry-boat; and I said these kinds of things was adventures; but he said he didn't want no more adventures. . . . Well, . . . he was most always right; he had an un-common level head, for a nigger.

I read considerable to Jim about kings, and dukes, and earls, and such, and how gaudy they dressed, and how much style they put on, and called each other your majesty, and your grace, and your lordship, and so on, 'stead of mister; and Jim's eyes bugged out, and he was intrested. He says:

'I didn' know dey was so many un um. I hain't hearn 'bout none un um, skasely, but ole King Sollermun, onless you counts dem kings dat's in a pack er 'k'yards. How much do a king git?

'Get?' I says; 'why, they get a thousand dollars a month if they want it; they can have as much as they want; everything belongs to them.'

'Ain' dat gay? En what dey got to do, Huck?'

'They don't do nothing! . . . They just set around.'

. . . [D]ey say Sollermun de wises' man dat ever live'. I doan' take no stock in dat. . . .

¹⁸ Ibid 78.

'... [H]e *was* the wisest man, anyway; because the widow she told me so, her own self.'

'I doan k'yer what de widder say, he warn't no wise man, nuther. He had some er de dad-fechedes' ways I ever see. Does you know 'bout dat chile dat he 'uz gwyne to chop in two?

'Yes, the widow told me about it.'

'Well, den! Warn' dat de beatenes' notion in de worl'? ... [W]hat use is a half a chile?

...

'But hang it, Jim, you've clean missed the point – blame it, you've missed it a thousand mile.'

...

'Blame de pint! I reck'n I knows what I knows. En mine you, de *real* pint is down funder – it's down deeper. It lays in de way Sollermun was raised. You take a man dat's got on'y one er two chillen; is dat man gwyne to be wastefull o' chillen? No, he aint; he can't 'ford it. *He* know how to value 'em. But you take a man dat's got 'bout five million chillen runnin' roun' de house, en it's diffunt. *He* as soon chop a chile in two as a cat. Dey's plenty mo'. A chile er two, mo' er less, warn't no consekens to Sollermun, dat fetch him!'

I never see such a nigger. If he got a notion in his head once, there warn't no getting it out again. He was the most down on Solomon of any nigger I ever see. So I went to talking about other kings, and let Solomon slide.¹⁹

Let us not concern ourselves as to whether Jim was on to something about 'de *real* pint'. Whilst Huck might claim that he did not appreciate his foster mother's efforts to 'sivilize' him with stories such as Solomon's Judgment, these stories have become a stock in his mind from which he can learn in deeper ways as he 'rereads' them as he hears different readings of them.

A key event in Huck's moral development takes place when tricks Jim into believing that their separation in a storm has only been Jim's dream and that Jim's agony over Huck's possible drowning has been a delusion. The account of Jim's realization that a trick has been played is as follows:

Jim ... had got the dream fixed so strong in his head that he couldn't seem to shake it loose and get the facts back into its place again, right away. But when he did get the thing straightened around, he looked at me steady, without ever smiling, and says:

¹⁹ Ibid 132-5.

'... When I got all wore out ... wid de callin' for you, en went to sleep, my heart wuz mos' broke bekase you wuz los', en I didn' k'yer no mo' what become er me en de raf'. En when I wake up en fine you back again', all safe en soun', de tears come en I could a got down on my knees en kiss' yo' foot I's so thankful. En all you wuz thinkin 'bout wuz how you could make a fool uv ole Jim wid a lie. Dat truck dah is *trash*; en trash is what people is dat puts dirt on de head er dey fren's en makes 'em ashamed.'

Then he got up slow, and walked to the wigwam, and went in there, without saying anything but that.²⁰

Jim's forceful and controlled reprimand, done 'without ever smiling', may well be a new experience for Huck, Jim has for the moment 'become' significantly different than he was before. To put it differently, a side of Jim until now silent has emerged.

What is to become of Huck? He immediately goes on to say: 'It made me feel so mean I could almost kissed *his* foot to get him to take it back.' There is more:

It was fifteen minutes before I could work myself up to go and humble myself to a nigger – but I done it, and I warn't ever sorry for it afterwards, neither. I didn't do him no more mean tricks, and I wouldn't done that one if I'd a knowed it would make him feel that way.²¹

The person who Huck calls 'nigger' (a word carrying historical freight that authorizes and naturalizes 'mean tricks') is becoming the only real friend that Huck has ever had. At a certain level in their interchange they jointly constitute a community grounded on a relation of equality. This is a very radical social change that will demand of Huck to rename his world, to become different than he was and is.

Let us rejoin White's reading. In adding another part to an explanation for Huck's capacity to resist his culture, White turns to Jim. After quoting Jim's 'trash' speech to Huck, White offers this reading as to what 'Jim in effect says':

What you have done injured me terribly, all the more because I have trusted and cared for you as a friend; indeed I still do care for you, enough to admit the injury and the caring, even now, and to tell you what you have done; in saying this I expose myself to further injury at your hands if you reject or ridicule me; but I hope that you will respond as a friend should,

²⁰ Ibid 142-3.

²¹ Ibid 143.

by recognizing the wrong you have done and making our friendship possible again. This is a performance of courage and love, unlike anything Huck has known.²²

This reading of Jim's speech as an act of 'hope' and 'courage' and 'love' is a performance that made me uncomfortable about my own initial failure to inhabit the voice of this person who is marginalized and degraded and vulnerable.

After quoting Huck's internal 'humble myself' talk in response to Jim's speech, White offers this comment:

The success of this moment is cooperative. It depends in the first place on Jim's great gift of generosity and love, and his willingness to risk injury. But that would not have registered on everyone; the other contribution is Huck's own, his habit of seeking the truth of his experience and looking for a way to say it, coupled with his unwillingness to lose what Jim has offered him.²³

White's reading of a 'success' would not have been registered by everyone, to speak only of my own experience of reading the novel. What would I (we?) have lost if I had not 'read' White's reading? Not just an 'experience' but a rare invitation to attend to it and to learn from it.

The novel's sixteenth chapter, which contains the 'crucial moral emergency', begins with Huck and Jim talking about nearing Cairo, Illinois, where Jim will be 'free':

. . . Jim said it made him all over trembly and feverish to be so close to freedom. Well, I can tell you it made me all over trembly and feverish, too, to hear him, because I begun to get it through my head that he *was* most free – and who was to blame for it? Why, *me*. I couldn't get that out of my conscience, no how nor no way. It got to troubling me so I couldn't rest; I couldn't stay still in one place. . . . I tried to make out to myself that *I* warn't to blame, because *I* didn't run Jim off from his rightful owner; but it warn't no use, conscience up and says, every time, 'But you knowed he was running for his freedom, and you could a paddled ashore and told somebody.' . . . Conscience says to me, 'What had poor Miss Watson done to you, that you could see her nigger go off right under your eyes and never say one single word? What did that poor old woman do to you, that you could treat her so mean? . . .'

²² *The Edge of Meaning* 40-1.

²³ *Ibid* 41.

Jim talked out loud all the time I was talking to myself. He was saying how the first thing he would do when he got to a free State he would go to saving up money and never spend a single cent, and when he got enough he would buy his wife, which was owned on a farm close to where Miss Watson lived; and then they would both work to buy the two children, and if their master wouldn't sell them, they'd get an Ab'litionist to go and steal them.

It most froze me to hear such talk. He wouldn't ever dared to talk such talk in his life before. Just see what a difference it made in him the minute he judged he was about to be free. It was according to the old saying, 'give a nigger an inch and he'll take an ell.' Thinks I, this is what comes of my not thinking. Here was this nigger which I had as good as helped to run away, coming right out flat-footed and saying he would steal his children – children that belonged to a man I didn't even know; a man that hadn't ever done me no harm.

I was sorry to hear Jim say that, it was such a lowering of him. My conscience got to stirring me up hotter than ever, until at last I says to it, 'Let up on me – it ain't to late yet – I'll paddle ashore at the first light and tell.' I felt easy, and happy, and light as a feather, right off. All my troubles was gone.²⁴

Huck's 'conscience', whatever this might be, has become disturbed at Jim's confident and aspiring 'talk'. Accepting or tolerating such talk back in his home community would be tantamount to siding with a 'low down Abolitionist'. What would become of his 'white' identity in this community? It was from this community that he heard the saying 'Give a nigger an inch and he'll take an ell.' The Huck that gives the saying new life is not the Huck that has become a friend to Jim. The passage just quoted could serve as a valuable resource for responding to the question 'Who am I?'. With Huck we do not have a unitary being. When 'Jim talked out loud' when 'I was talking to myself', who is the 'I' in relation to 'myself'? Is this the same 'I' who at the end 'felt easy, and happy, and light as a feather'? It seems to me that there are at least several voices to be heard in that which goes by 'I'.

With the language of race now coming to the fore in Huck, he paddles ashore, under the guise of finding out whether they have reached Cairo (and 'freedom'), with the intention to turn Jim in. But this intention is interrupted:

Jim sings out:

²⁴ *Huckleberry Finn* 145-46.

'We's safe, Huck, we's safe! Jump up and crack yo' heels, dat's de good ole Cairo at las', I jis knows it.'

I says:

'I'll take the canoe and go and see, Jim. It mightn't be, you know.'

He jumped and got the canoe ready, and put his old coat in the bottom for me to set on, and give me the paddle; and as I shoved off, he says:

'Pooty soon I'll be a-shout'n for joy, en I'll say, its all on accounts o' Huck; I's a free man, en I couldn't ever ben free ef it hadn' ben for Huck; Huck done it. Jim won't ever forgit you, Huck; you's de bes' fren' Jim's ever had; en you's de *only* fren' ole Jim's got now.'

I was paddling off, all in a sweat to tell on him; but when he says this, it seemed to take the tuck all out of me. I went along slow then, and I warn't right down certain whether I was glad I started or whether I warn't. When I was fifty yards off, Jim says:

'Dah you goes, de ole true Huck; de on'y white genlman dat ever kep' his promise to ole Jim.'

Well, I just felt sick. But I says, I *got* to do it – I can't get *out* of it.²⁵

What is to become of this last 'I'? What is going on in the 'I' that 'just felt sick'? What brought about the unpleasant feeling?

Those questions, thinks economist Dawson, are the kind of questions that might well be of interest to Geoffrey Hodgson, who, in *Economics and Institutions* (1988), seeks to say 'farewell' to the conventional image of 'economic man'.²⁶ *Homo economicus* is commonly imagined as being autonomous in the sense of having a constitution that is separate from social factors and forces, such as acts of language. Hodgson seeks to trouble such imagining:

From the moment we are born we begin to acquire a social language and a shared symbolic order. Individual knowledge is expressed in a social language and passed through a set of socially acquired cognitive filters. We perceive much of the world through language and symbols that have no meaning in an individual sense. Our express aims and purposes, whatever their individual qualities, are formulated in language that is in its essence not individual but social.²⁷

²⁵ Ibid 146-47.

²⁶ G M Hodgson, *Economics and Institutions: A Manifesto for a Modern Institutional Economics* (1988) 51.

²⁷ Ibid 123.

Huck's crisis, especially when he 'just felt sick', offers much food-for-thought for thinking about the fundamental role of 'social language' in the constitution of an 'individual'. Our inherited language of individualism arguably is in need of some revitalization. Perhaps we need a new word? What about 'interdividual'?²⁸ Might that unfamiliar word productively render the familiar 'individual' strange?

Back to Huck. Immediately after feeling sick, along comes a skiff with two men in it with guns. These two men are slave hunters. Huck decides not to betray Jim and he cleverly tricks them to depart without checking the raft. Then we hear Huck:

They went off, and I got aboard the raft, feeling bad and low, because I knowed very well I had done wrong, and I see it warn't no use for me to try to learn to do right; a body that don't get *started* right when he's little, ain't got no show – when the pinch comes there ain't nothing to back him up and keep him to his work, and so he gets beat. Then I thought a minute, and says to myself, hold on, – s'pose you'd a done right and give Jim up; would you felt better that what you do now? No, says I, I'd feel bad – I'd feel just the same way I do now. Well, then, says I, what's the use you learning to do right, when its troublesome to do right and ain't no trouble to do wrong, and the wages is just the same? I was stuck. I couldn't answer that. So I reckoned I wouldn't both no more about it, but after this always do whichever come handiest at the time.²⁹

Huck's rule, 'do whichever come handiest at the time', may sound unsound, lacking moral grounds, but we may do well to join a number of commentators (including White) and resist making such a judgment.³⁰

The reading from Twain's novel in *The Legal Imagination* is taken from the 'emergency' chapter. White's questions invite a close reading:

²⁸ This word can be traced to the literary critic and philosopher René Girard, who has much to say about consciousness and the dynamics of desire, which he distinguished from 'appetites and needs', the concern of conventional economists. See E Webb, *Philosophers of Consciousness: Polanyi, Lonergan, Voegelin, Ricoeur, Girard, Kierkegaard* (1988) 183-225. 'The term *interdividuel* . . . refers to the idea that we are not "individuals" our romanticism would lead us to suppose. Rather our psychic life takes place as an interaction in a field of forces that is inherently multiple, articulated inwardly as a set of relations among imitator, mediators, and objects' (216-17..

²⁹ *Huckleberry Finn* 149.

³⁰ See, for example, Blair, *op cit*, 143. See also Patrick Brennan's review of *The Edge of Meaning – 'Meaning's Edge, Love's Priority'* (2003) 101 *Michigan Law Review* 2060, 2072.

1. When Huck says that he will just do what comes handiest at the time, what does he mean by 'handy'? Is this a statement of pure hedonism, moral whimsicality, total unconcern for what sort of person he is, or what?
2. In what terms would you characterize the course of action that Huck here calls the 'handiest,' the one that 'ain't no trouble'? Why does Huck not perceive it as you do and describe it in the terms you would use.
3. Can you think of any modern parallels to this scene? . . . Can you imagine any situations in which you or I might talk in a confused way about right and wrong, any matters on which your views or mine might sound as confused as Huck's last paragraph - or worse? Or can one never perceive that sort of confusion in oneself?
4. One might say that Huck's situation is really not so difficult after all, that all he had to do was state the abolitionist position, which he so unaccountably found impossible. Why do you suppose he found that impossible?
 - a. One view might be that what Huck struggles with here is not bad language but bad ideas, bad values.
 - (1) What view of language is implicit in such a remark: that it is a simple and frictionless machine for conveying ideas from mind to mind? A transparent vessel for holding visible values? An instrument for pointing to things and ideas in the real world, the true and only realities, plainly observable to all?
 - (2) Does Huck appear to you to value slavery and to approve of its social and other implications? If not, why does he not see what we see, and say what we would say?
 - b. The view that one's values exist outside of and unaffected by one's language disregards the experience of being brought up to say 'nigger,' and ignores the effect of such a word on human relationships. Such a word, defining such a relationship, is a real fact of existence with which one must in some way come to terms.
 - c. It may help you to see Huck's position if you ask what else he could have called Jim than 'nigger.' Exactly what other word in the language he was given might he have used? To say 'my best friend, Jim' would have been an absurdity - 'slave' and 'friend' cannot go together that way, because 'slave' means 'chattel.' It could only be understood in some peculiar or metaphorical way like 'my best friend, Lassie' or 'my best friend, IBM.' Huck makes no verbal response when Jim calls him the 'best fren' Jim's ever had,' though he is deeply affected and it is clear the friendship goes both ways. To say something directed to the general social situation, such as 'slaves are really our equals,' would be to attack an institution central to society, imbued with all the values of property, regularity, productivity, the necessary order of

things; to speak against it would be to incite to anarchy. As Huck rightly saw, the idea of slavery was intimately tied to the most fundamental ideas of right and wrong, and the untangling was beyond his capacities.

5. What was called for in Huck's situation was nothing less than a new way of imagining human relationships and a new way of expressing one's imagination. Huck achieves the first – the experience of the boy and the slave on the raft is a genuine discovery – but he fails to do the second and retreats into silence: at the end of the book he 'lights out for the territories.' In this passage, Twain does achieve a new way of expressing a newly imagined relationship, but even he has difficulties. . . . Twain's crisis of imagination might become clearer if you pretend you are Twain, having written the passage you have just read. What will the rest of your novel be like: what will Huck and Jim do and say next, whom will they meet and on what terms? What will they talk about and how? Can you imagine a friendship between these two people expressed in their actual lives in the world? Or will they have to stay on the raft forever? . . . You may be interested to know that Twain in fact stopped writing this book at this point for several years, apparently stuck, not knowing how to go on. Many critics think that the rest of the novel fails to live up to what was achieved here, that at this point the imagination collapses. . . . Are there matters as to which we are situated somewhat like Huck or Twain? . . .³¹

These questions were among the first questions in *The Legal Imagination* with which I engaged. They were quite different from any questions that I had ever been asked. Concerning the N-word, I had never been invited to think carefully about 'the effect of such a word on human relationships'. In doing so, I pursued a line of inquiry that came to center on the resources and limits of our languages. In the process, I repeatedly had the *experience* that Twain 'apparently' had, namely that of 'not knowing how to go on'. The experience was an uncomfortable one, to say the least. At certain stages, various questions emerged from within, such as 'What do I say?' and 'Who is this "I"?' This was a crisis of choice and identity.

The first four questions can serve to bring home the inadequacy of certain metaphors for the phenomenon of language ('frictionless machine', 'transparent vessel', 'instrument for pointing to things'). White challenges any claim that 'one's values exist *outside* of . . . language' (emphasis added) and he seemingly invites us to imagine a person as a process of valuing, one who values, herself and others, through

³¹ *The Legal Imagination* 25-6.

composing with an inherited language, in which she is embedded. White has invited his readers to attend to Huck's 'experience of being brought up to say "nigger," and . . . the effect of such a word' on his relationships, especially with Jim. Huck was growing up in a world in which the use of the word 'nigger' was commonly an exercise of racist power, an act of degradation that had become institutionalized, aiding the perpetuation of slavery by rendering it part of the natural order of world.³² Huck's friendship with Jim does not fit with this natural order, and he now finds himself having to compose a new order, a new self.

For assistance with White's early questions we can do well to turn to Elizabeth Hodges' *Writing in a Different Voice* (1988),³³ part of which reads as if it is a direct response to several of the questions.³⁴ Consider, for example, what she says about the movement after Huck recites the 'inch' saying:

Thinking within the ethical and social terms of his society, he resolves with great difficulty to paddle ashore . . . to turn Jim in. But when Jim says, 'you's de bes' fren' Jim's ever had,' Huck is unmanned: 'it seemed to kind of take all the tuck out of me.' Jim is defining his relation to Huck, not in the context of master-slave or white-black, but in new and non-racial terms. His language momentarily escapes the dominating system through which he and Huck had been forced to define themselves. . . . Caught between two different ways of thinking and speaking, he is not quite able to see that the 'right' thing to do is, in his own words, the 'wrong' thing. The labels put him in a bind which he escapes only by changing the words: 'So I reckoned I wouldn't bother no more about it, but after this always do whichever come handiest at the time.' In his struggle to free himself from inherited ways of thinking, he opens up a different linguistic space by using the term 'handiest,' establishing a different standard that could generate a new language, and perhaps, in time, a new social condition. Through his own language, Huck implies a new system of thought that would enable blacks and whites to live together as friends.³⁵

Hodges here offers what sounds to me to be a fitting response to the first of White's questions. As her close reading suggests, Huck's creative use of 'handiest' seems to be

³² For more on the N-word, see White's 'What's Wrong with Our Talk about Race?: On History, Particularity, and Affirmative Action' (2002) 100 *Michigan Law Review* 1927, 1934, n 15.

³³ E P Hodges, 'Writing in a Different Voice' (1988) 66 *Texas Law Review* 629.

³⁴ In her talk about 'voice' Hodges (ibid 630, note 6) refers to White's *When Words Lose Their Meaning* and to *Heracles' Bow* but not to *The Legal Imagination*.

³⁵ Ibid 631-2.

the nerve of an extraordinarily complex process involving 'language', 'inherited ways of thinking', and the reconstitution of character and community.

In Twain's novel Hodges senses that we have a microcosm of a society, namely, 'a system of varied and opposing voices continually developing and renewing itself.'³⁶ *Huckleberry Finn* offers a resource for thinking about a particular social process: through its hero, 'Twain illustrates the intricate process by which the human voice in all of its complexity wages battle against stereotyping and sterility.'³⁷ With this 'battle' in mind, Hodges considers that *Huckleberry Finn* can help law students think about the possibilities of thinking and speaking like a lawyer:

In teaching writing to law school students, I notice a conscious effort on their part to erase any sign of nonprofessional discourse. In their effort to survive the first year, they somehow learn that this is what they ought to do. They come to view the law as a tool for achieving objectivity and even 'truth,' concepts that they perceive to have some absolute and fixed value. Some part of the self, in other words, seems to swallow whole, without recognizing it, the language of 'right' and power with which Huck begins to quarrel.³⁸

In directing attention to the 'conscious effort on their part', Hodges can empower a different 'part of the self' to imagine the law as a medium for 'achieving objectivity' of a different kind.

As we may readily imagine White hoping, Hodges invites her students to engage in a dialogue resembling that which Huck has with himself. She urges them, 'to hop on a raft and, rather than parrot the worst of legal expression, to examine both their own language and that of other legal and literary authors, exploring the assumptions and preconceptions that underlie these writings.'³⁹ Such an invitation can be disturbing and challenging: 'The students are, at times, as uncomfortable as Huck, fearful of the prospect of forging a new language and a new order out of a wider range of experiences and voices than is usually expected in a legal context.'⁴⁰ Students can expect to develop a new relationship with their language:

³⁶ Ibid 632.

³⁷ Ibid 632-3.

³⁸ Ibid 633.

³⁹ Ibid.

They begin to see that much of what they write is 'wrong,' not necessarily because the content is 'wrong,' but because their language fails to reflect the unavoidable fact of their membership in a larger community from which they derive their fundamental linguistic abilities and to which, as mediators from the world of law, they must communicate. Some failure is inevitable, for like Huck, we inherit ways of thinking that become ways of speaking, and we risk becoming partially blinded by the very formulas we strive to master. But like Huck, too, we need to be alert to the limitations of formulas and to the ideologies buried within them so that we may avoid their potentially rigid grip.⁴¹

What Hodges says here can serve as a response to White's third question, which concerned 'any modern parallels to this scene'.⁴²

Concerning the next part of the third question, critical commentary on White's engagement with *Huckleberry Finn* resides in Robin West's *Communities, Texts, and Law* (1988). After quoting the paragraph in which Huck quotes the 'Give a nigger an inch' saying, she says:

Huck, of course, eventually does the right thing; and he does it against the weight of considerable community pressure and in the face of considerable danger. But at no point does Huck experience the conflict between the community's corrupt and racist moral code and his own sense of what he wants to do as a conflict between the positive code of the community and the demands of a truer, higher morality. At no point does he articulate a compelling case against the dehumanization of his friend, either to himself, to Jim, to the communities with which he interacts, or even to his confidant Tom. Never does he question the authority of the social code that dictates the abuses against which he rebels, nor does he reconceptualize what morality requires from the 'strands' of the community's splintered and disingenuous codes. Huck is not even a successful reformer. Huck stands by Jim not because he sees Jim's cause as just, feels for his dilemma, or shares his pain – in fact he doesn't. Rather, Huck stands by Jim because he feels himself bound by his promise to do so. Huck ultimately does the right thing for the wrong reason: he helps Jim out of fidelity to himself.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² R West, 'Communities, Texts, and Law: Reflections on the Law and Literature Movement' (1988) 1 *Yale Journal of Law & the Humanities* 129, 139.

But hang it, Professor West, it seems to me that you've clean missed the point. In what sense and from which standpoint did Huck 'ultimately' do 'the right thing for the wrong reason'? You might have done well, Professor West, to elaborate on what you mean by 'fidelity to himself'. The attention here could be on not so much the word 'fidelity' but 'himself'. Huck 'himself', I would stress, is 'a plural I' a complex collection of selves, which are continuously evolving through interaction between internal voices and between internal and external voices. (Is not Twain's novel cavorting with the categories of 'internal' and 'external'?) From whose standpoint is the 'community's . . . moral code' 'corrupt'? Professor West, you seem to me to be saying that 'the demands of a truer, higher morality' are simply out there for us to plainly see and grasp. If this is what you are saying, I would say that you are not getting *in* to the conversation in which Professor White is involved. A guiding question in this particular conversation is, How is it that Huck is able to resist or transcend his culture as successfully as he does? You might well want to ask, How might Huck have been more 'successful'? But that seems to me to be a different game. Sure, a self within Huck would have done very well to ask another self within him some tricky questions that lead him to 'experience the conflict between the community's corrupt and racist moral code and his own sense of what he wants to do as a conflict between the positive code of the community and the demands of a truer, higher morality'. But that does raise the awkward matter of what 'his own sense of what he wants to do' *is*. What do the words 'his own' point to? And who is the 'he' in 'what he wants to do'? There seems to me to be a major identity crisis going on in 'Huck', and any pronoun that he or we might use to talk about what 'he' is up to just seems to be a clumsy mess. Let's attend to this mess, at least for the purpose of doing justice to White's questions.

White's fifth question calls for a fuller engagement with the composer of *Huckleberry Finn*.⁴³ an engagement that White takes up in *The Edge of Meaning*. Huck

⁴³ For a helpful discussion about how to talk about 'Twain', see W Booth, 'Why Banning Ethical Criticism is a Serious Mistake' (1998) 22 *Philosophy and Literature* 366. In pursuing what he calls a 'full engagement' with *Huckleberry Finn* and other literary works, Booth considers it to be of great value to distinguish between the narrator and the 'implied author', the latter being distinct from the real-life author, who may have all sorts of characteristics that are not manifest in the text. In an elaboration, Booth talked about the use of the N-word in Twain's novel. This word is offensive to many people, and its use may directly lead them to make bold declarations on the immorality of 'Mark Twain'. Not so for Booth:

began his literary life in *The Adventures of Tom Sawyer*, 'which is a rather straightforwardly humorous tale of boyish life in a town on the banks of the Mississippi, told by an omniscient narrator who stands outside and above his characters.'⁴⁴ In this place 'above', the narrator is 'constantly affirming his own superiority, and that of his reader, to the boys whose story he tells.'⁴⁵ For White, Huck takes on a whole new life in *Huckleberry Finn*:

I think Twain's original idea was to make fun both of the boy himself, as a kind of social idiot, and of the society he cannot comprehend, in both cases once more affirming the superiority of the audience, who of course know so much better than Huck and Petersburg both. But this does not quite work: as the novel actually works we see things from Huck's point of view, we hear his voice, and in this light his struggles and failures have a kind of urgency and poignancy—a reality—that they would otherwise have lacked. In a sense the story gets out of Twain's control to become much better than he originally intended, a moral drama of the first significance.⁴⁶

So much for 'fun'! Reading a work of imaginative literature such as *Huckleberry Finn* just for the fun of it might unexpectedly turn out to be not only fun but also seriously serious. For example, if a work 'gets out of control', one might be positioned well to sense the resources and limits of languages and to appreciate that it might become imaginable for one to be to some degree in control of one's languages – to have, that is, a self worthy of the name. In this regard, lawyers and nonlawyers alike have much to

Huck Finn and others in *Huckleberry Finn* use the insulting word 'nigger' again and again; Mark Twain the implied author never does. Indeed, he can be seen by any alert reader as always mocking and morally condemning those who do. . . . When Huck arrives at Aunt Sally's, she asks about a river boat accident: 'Anybody hurt?' And Huck replies, 'No'm. Killed a nigger.' To which she replies, 'Well, it's lucky; because sometimes people do get hurt.' Many an untrained or inattentive reader might miss the point that Twain is not here 'using' the contemptuous distinction between 'niggers' and 'people' but rather attacking those who do. Surely such readers, whether African-American or not, need the help of teachers who labor to implant habits of ethical criticism. (377)

For Booth, 'the full engagement' with a story involves an interchange with 'the chooser, the molder, the shaper: an implied author who is usually – at least in works as complex as *Huckleberry Finn* . . . – somewhat more complex ethically than any one character portrayed' (ibid). The 'Mark Twain' we interchange with reading *Huckleberry Finn* 'is not the complex flesh-and-blood Samuel Clemens but the person who has sloughed off all characteristics except those that strengthen the story; the real Clemens has created the superior Twain that we engage with' (ibid). We may do well to keep this path of inquiry into author identity in our minds as we read White's engagement with Twain, for it would seem to me that we get to know the 'implied author' in part by getting to know the 'implied' reader. Who, we might ask, does 'White' invite his readers to become?

⁴⁴ *The Edge of Meaning* 28-9.

⁴⁵ Ibid 29.

learn from 'literature'. Appreciating this possibility could enable one to imagine not a 'law and literature' movement but a 'law *as* literature' movement.

White suggests that the story 'gets out of Twain's control' when Huck refuses to turn Jim in: 'From the great moment at the end of chapter 16, neither Huck, in the imagined world of the novel, nor Twain in creating it, has anywhere to go.' For there is no place for them to live out their friendship:

Huck and Jim cannot maintain their identities and relations in the world of the America South. . . . The novelist can proceed beyond chapter 16 only by separating the two characters, by introducing new and somewhat farcical characters, by bringing Tom Sawyer back into it, and so on. . . . Twain in fact stopped writing the book for several years at this point, I think because he could not imagine how it could continue – how these two people could live and act out of their new relation of respect and friendship in the only world available to them.⁴⁷

That Twain found the limits of his imagination, we may take it, is an unforeseen consequence of his decision make Huck the narrator, a decision that brought out some fundamental difficulties of talking about 'race'.

What else might Twain have been up to? Further exercising his imagination on Twain's decision to make Huck the narrator, White offers these thoughts:

I think Twain wants us to imagine Huck as writing to us as he speaks to himself; he speaks to us as a part of himself, as a way of thinking about his experience, making it his own, and building himself upon it. He writes to himself and us, for there is nobody else in his world to whom he can speak, no one who sees him or recognizes him. He writes to create the voice in which he does so, out of which he lives, and with which he creates the sense of a possible audience. The self he makes by speaking and thinking in this way, insisting upon the truth of his experience, becomes, in the end, a self capable of giving and receiving love.⁴⁸

This 'self' Huck makes, to put it differently, is capable of treating a fellow human as a person who has claims to autonomy and respect. (Here we have a model for a lawyer as composer, who seeks to do justice though her compositions.) Such treatment is of

⁴⁶ Ibid.

⁴⁷ Ibid 45.

course difficult to imagine outside their community of two, where the brutal N-word thrives. No wonder Twain eventually had Huck 'light out of the territories'.

* * *

We might wonder about the place of White's engagement with *Huckleberry Finn* in the law classroom. (Might not the ordinary law student feel inclined to 'light out for the territories', to, say, Economics?) Speaking generally about his legal writing course, White says this in the penultimate chapter of *The Legal Imagination*:

You might sum up the experience this course offers by saying that it is an experience in the collapse of language under strain: the collapse not only of the legal language, but of the other languages you have used (or psychology, of race, of social organization, of explanation, of criticism, of paper-writing, and so on). You have experienced what could be called the central frustration of writer and lawyer, the perpetual breaking down of language in your hands as you try to use it. None of our languages seems to be able to do what it promises, none can bear the stresses of our demands for truth and order and justice. Such, it seems to me, are the conditions of our existence.⁴⁹

What an experience for the law student! Speaking specifically, *Huckleberry Finn* seems to me to be an excellent vehicle for 'an experience in the collapse of language under strain'. When confronted with 'the conditions of existence', with, that is, a universe of imperfect languages, it seems to me that the only activity 'I' (or, better, 'we') can do is to *compose*, in and out of the law, in a manner that attains a fitting relation with 'my' languages, a relation which hopefully contributes to the creation of healthy and vibrant communities.

⁴⁸ Ibid 42.

⁴⁹ *The Legal Imagination* 760.

Hope

From his first book through to his last, White draws attention to features of law that are widely neglected in legal discourse. He does so with the hope of improving the discourse. What are we to make of his 'hope'? Let's hope to catch his drift.

* * *

A good place to start is perhaps *When Words Lose Their Meaning*. The title has perplexed some readers. A reader familiar with 'antifoundational' movements in literary criticism may, when she first reads the title, expect the book to give particular attention to the ways in which words *lose* their meaning. Consider a situation in which a word loses its meaning. A young and enthusiastic rock-lover imagines that she can talk about a rock without having to point to it. The word 'rock', she assumes, can serve perfectly well, for its meaning is seemingly self-evident, just like men being all created equal. The word 'rock', like the word 'equal', has a literal meaning. The rock-lover, however, soon learns that her efforts to talk 'clearly' about a rock are unsuccessful. Part of her distressing experience is the reality that she no longer knows what the word 'literal' points to anymore, not to mention 'reality'. Despair sets in, along with an awful feeling of 'alienation' from the world, and from 'the people' in it. And so on. Alternatively, imagine an economist who has used the word 'rational' a certain way for years, and without any difficulty. Then a Socratic philosopher comes along, and during an interchange the economist has the experience of never being able to hear the word 'rationality' in quite the same way again. Her life begins to fall apart. Such experiences might be the heart of White's book, judging by its title? In a word, *no*. Let White locate himself:

This book's title may . . . suggest that it bears affinities to the modern movement known as deconstruction. My earlier book, *The Legal Imagination* . . . , can be read as a kind of forced deconstruction of legal language against the resistance of the reader, undertaken to confront him with a part of the truth of his situation in the world. But there I ultimately present the

law as a way out, as a method of constructing a world, a self, and a life; similarly, here, the emphasis is less on the fluid conditions of life and language than on the constructive responses to them achieved in the great texts examined here. As I read Thucydides, for example, he brings himself and his reader to face an ultimate disintegration of language, community, and self, and he performs one kind of response to that predicament through the very act of reconstituting that experience; Plato performs another response in the communal remaking of language and self of the kind that takes place in dialectical philosophy. Swift, Johnson and Austen engage in similar constructive processes in communities that gradually expand beyond two, and in reading Burke and the other political writers, we examine attempts to reconstitute a world at the level of the nation and beyond. Unlike most deconstructionists, moreover, as my text makes plain, I believe in the accessibility of the text to the mind of the reader and in the possibility of a coherent and shared reading of it. Thus I hope that the reader will see that the title of this book does not express a postmodern despair but rather, implies a kind of optimism. Of course words lose their meaning. That is what they have always done and will always do. What matters, in the face of this fact, is to understand the reconstitutions of language, character, and community that people have nonetheless managed to achieve in the texts they have made with each other and with us.¹

Whilst reading *When Words Lose Their Meaning* a deconstructionist may well come to sense that the key word in the title is not 'lose' but 'when'. White's concern is with ways in which a user of language can go on *when* words lose their meaning. A word for 'a kind of optimism' that is central to White's work is *hope*. White has 'hope', to use his key word, that his reader will see that the title of his book does not express a postmodern despair but rather, a kind of hope.

* * *

Another good place to start is with some prefatory remarks in White's course book. Connected with his efforts to create an environment in which it could be genuinely said that 'we are all colleagues here',² White adopts an egalitarian form of address ('I' and 'you'), about which he says:

¹ *When Words Lose Their Meaning* 289-90.

² *The Legal Imagination* xxii.

The book is addressed to the individual student, not to the usual anonymous reader. . . . That my own voice is somewhat more personal here than is usually the case is a reflection of an attempt to define a candid relationship with the student, not a claim for the value of my own idiosyncrasies. The hope is that the student will respond in kind, that he will be less timid about exposing his own individuality. I hope other teachers will not be inhibited by my tone from exposing their own intellectual personalities, in similar ways, in courses that they teach using this book. One of my purposes is to encourage the student to make a life of his own in the law, to resist the pressures to conform to the expectations of others. I try to record here something of my own attempt to do that as a way of urging him to assert himself boldly. The teacher will have to be prepared to assert his interests and capabilities too, but I think it best not to hide that fact by a pretended objectivity of voice. All I can do is urge him to make a course of his own out of these materials, treating them with no more respect than he thinks they deserve.³

Here in explicit words and in an open, conversational tone (*Voice), White in effect invites us – teachers and students – to challenge the common distinction between the personal and the professional. This is a call for integration not just at the level of a person but also in the classroom (*Integration), which in teacher-student relations can readily degenerate into ‘them’ versus ‘us’. In his invitation to personal/professional integration, White has begun an invitation to deny authority to a way of talking, to a ‘tone’ into which readers are invited to tune. White’s invitation is an act of ‘hope’, which we can take to be founded on the belief in the possibility of a better ‘life . . . in the law’, at least relative to that governed by existing ‘pressures’ and ‘expectations’. What White means by ‘pressures’ and ‘expectations’ can be readily caught by engaging in his question relating to Huckleberry Finn’s efforts to resist turning ‘nigger’ and fugitive slave Jim in to the authorities (*Experience).

Intimately related to White’s ‘hope’, the heart *The Legal Imagination* arguably concerns the topic of justice. In one of his many readings we eavesdrop on a dispute, as presented by Plato in the *Republic*, between Socrates and the sophist Thrasymachus about justice. Thrasymachus claims that ‘justice is in the interest of the stronger’, by which he means that the standards defining what is just are set by the ruling elite acting in its own interest. To this White asks, among other questions, ‘Suppose

³ Ibid xxiii.

Thrasymachus were a law school student called to criticize a judicial opinion or statute; how might he do so? What standards or values might he invoke, in what vocabulary?’⁴ A little later, White provides a lengthy passage from the Preface to Richard Hooker’s multi-volume *Of the Laws of Ecclesiastical Polity* (1593). Hooker’s work is an attempt to persuade Calvinists to conform to the laws of the Church of England. In White’s introductory words, ‘The Calvinist position was that there had been a falling away from the true and simple principles of early Christianity, and that questions of church governance, doctrine, and practice should be settled by the plain meaning of the Holy Scriptures without reference to the customs and practices that had evolved over the years.’⁵ In the Preface to the *Polity*, ‘Hooker addresses the Calvinists directly, explaining what he thinks is at stake in the dispute and hoping to set the terms by which it will proceed.’⁶ The passage White reproduces ‘can be taken as expressing a way of responding to and dealing with the views of others, whether expressed in rules or some other form, and as defining a process of argument and reasoning by which differences in judgment and inclination can be addressed.’⁷ After the passage reproduced from the *Polity*, White offers two fundamental questions, both of which concern not only the *Polity* but a passage from Plato about justice:

It might be suggested that both Hooker and Plato define justice not by stating certain rules or doctrines or principles of public life, but by demonstrating certain ways of reasoning and conversing about important matters. Justice is defined by the intellectual processes through which the best men reach conclusions and argue about them.

1. Do you agree with this interpretation of what Hooker and Plato are saying? How can you define the processes of reasoning and conversation which each one celebrates.
2. Does the view attributed to Plato and Hooker have any validity as applied to modern law? How would you define the processes of reasoning and conversation which constitute the heart of modern justice?⁸

Those questions are an invitation not for a univocal theory or concept of justice but a polyphonic composition on justice (*Justice; Voice). This composition can be imagined

⁴ Ibid 641.

⁵ Ibid 670-71.

⁶ Ibid 671.

⁷ Ibid.

⁸ Ibid 682.

as a 'conversation' in which the composer addresses her (or his) reader as a rhetorical equal, an independent mind, and a whole person (*Equality; Integration; Rhetoric). In doing so, she may *hope* to offer a model for 'the heart of modern justice', especially as it concerns the institution of the hearing, 'the heart of the legal process'.⁹

* * *

In an assignment on judicial criticism, the reader of *The Legal Imagination* engages with what I consider to be White's distinctive image of the heart of the law, an image that lends itself to talk about the hopes that lawyers and nonlawyers alike may do well to have for the law. The assignment is titled 'What Do You Approve Of?' Here it is:

You have no doubt often had the experience of disapproving of a judicial opinion which reaches a result with which you agree: as a fellow judge, you would have concurred in the judgment but not the opinion, as the common phrase puts it. You have probably also had the converse experience (though it is perhaps a more complicated one) of approving of an opinion but disagreeing with its result: as a fellow judge, you would have respectfully dissented, rejecting the result but being pleased to have such a colleague on the bench. Something like this happens as well in ordinary life: 'Tom? Wonderful fellow - never agreed with him in my life!' It is this paradoxical situation that this assignment asks you to explore.

Part One

Explain what it is you approve of when you approve of a judicial opinion which reaches a result with which you agree.

Part Two

Explain what it is you approve of when you approve of a judicial opinion which reaches a result with which you disagree.

Part Three

Based upon your answers to Parts One and Two of this assignment, what is excellence in the judicial opinion?¹⁰

⁹ Ibid 19.

¹⁰ *The Legal Imagination* 734-35.

This assignment brings to mind a judicial opinion that I once largely approved of but had disagreed with its result. The case, decided in 1870, concerned the ‘ownership’ of the foreshore in New Zealand. Some details, which I take from my *The Treaty of Waitangi and the Control of Language*, are as follows. Many if not most Europeans who arrived in New Zealand in the 1840s and 1850s evidently were unaware that tribes claimed the right to manage and control the foreshore. As a matter of custom for the former, the foreshore was open to all for fishing. The Kauwaeranga foreshore became the center of a dispute between Ngati Maru and other tribes and gold-diggers in the late 1860s, just after some of the major ‘land wars’ in New Zealand. In August 1867 the *New Zealand Herald* published a report concerning gold on the foreshore next to a settlement that had been recently called Shortland. The report expressed some optimism for prospectors. One history of the era tells us:

After the regiments had sailed away in 1865 and 1866 the land speculators, whose preponderant influence in government had enabled them to take sordid advantage of a gallant enemy, were unexpectedly presented with a new field for investment in the Thames goldfield. . . . By 1867 Auckland was ready to grasp at any measure to ward off the depression caused by the withdrawal of the Imperial regiments . . . Prospects at Kauwaeranga were by no means proven, but negotiations with the Ngatimaru were pushed ahead to open the district.¹¹

The word ‘ignoble’ would seem to be a fitting word for describing these moments in the colonization of New Zealand. Of assistance to certain colonial ‘business’ activity was the passage of the Goldfields Amendment Act 1868. This statute opened tribal land for gold mining. In response, Tanameha Te Moananui and twenty-six others of Ngati Maru and other sub-tribes sent a petition to the New Zealand Parliament in August 1869:

O friends the Assembly of Chiefs, salutations to you all. . . . The word has come to us that you are taking our places from high water-mark outwards. . . . O fathers, great is the grief, great is the sorrow, great is the objection, great is the searching, great is the considering of the heart on the subject of that work of yours.

¹¹ J Salmon, *A History of Goldmining in New Zealand* (1963) 177.

O friends, it is wrong, it is evil. Our voice, the voice of Hauraki has agreed that we shall retain parts of the sea from the high water-mark outwards. These places were in our possession from time immemorial; these are the places from which food was obtained from the time of our ancestors . . . down to us their descendants. Why do you desire to seize heedlessly upon these places? What fault of ours has been discovered by you? . . .

O friends, our hands, our feet, our bodies, are always on our places of the sea; the fish, the mussels, the shell-fish are there. Our hands are holding on to those, extending even to the gold beneath. The men, the women, the children, are united in this, that they alone are to have the control of all the places of the sea, and that the Europeans are to have nothing to do with them.

O friends, give effect to our request. Leave to us our own, the places of the sea. Act justly towards the good tribe, because the searching for justice is with you.¹²

What was to become of 'the Crown' in Parliament in 'the searching for justice'? And what was to become of the indigenes?

Against the expressed will of 'the Crown', the matter of the title to the foreshore was brought before the Native Land Court in the *Kauwaeranga* case.¹³ Whilst willing to grant a right of fishery to the indigenes, Chief Justice Fenton expressed concern about granting titles to areas below high water mark and declined to do so:

I cannot contemplate without uneasiness the evil consequences which might ensue from judicially declaring that the soil of the foreshore of the colony will be vested absolutely in the natives, if they can prove certain acts of ownership, especially when I consider how readily they may prove such, and how impossible it is to contradict them if they only agree amongst themselves.¹⁴

In perceiving possible 'evil consequences', Fenton presumably was concerned that tribes would have a significant degree of governing power over Europeans.

Let me put aside the reasons that may have been associated with the imagined 'evil consequences'. Of present significance, when I wrote my book I disagreed with the result. In my book I say nothing about the parts of the opinion that I approved of.

¹² *Appendices to the Journals of the House of Representatives* 1969, F. No.7, 18.

¹³ *Kauwaeranga* (1870) 4 Hauraki MB 236, reprinted and annotated by A Frame, 'Kauwaeranga Judgment' (1984) 14 *Victoria University of Wellington Law Review* 227.

¹⁴ *Ibid* 244

White's assignment carried me away into thinking that my silence was a significant omission. I now think my silence re-sounded an image of the law that I was living by and emphasizing, namely *an instrument of power*, with a strong element of violence. There is obviously some truth to that image, but I think that an unbalanced emphasis can be given to it.

A fragment from Fenton's opinion that I would have done well to discuss in my book is as follows:

It is at once evident what a vast range of constitutional and international law the inquiry into this subject must embrace, and the Court feels that Parliament could never have contemplated that the Native Land Court would have to determine questions demanding so much research, and involving such great responsibility and such important consequences. Influenced by this thought, I endeavoured to induce the parties to agree to a formal judgment framed by arrangement in such a manner that resort could easily be had to the Supreme Court, where alone such grave matters should be decided. But the parties did not accede to this proposal, and this Court is therefore bound to give decision. Could the Court suppose that this decision would be final, it would content itself with simply expressing its opinion in the usual manner; but, influenced by the hope that it may be the wish – as the Court thinks it is the duty – of the parties to apply to the Supreme Court to review this judgment, it seems that due respect to that tribunal demands that this lower Court should not limit itself to a bare statement of the conclusion at which it has arrived, but should set forth the reasoning through which its decision has been arrived at.¹⁵

The question . . . is: (1.) Is this mudflat land in or to which the Maoris, in 1840, had any and what estate, title, or interest, or over which they exercised rights of ownership? And (2.) did the cession of the sovereignty of the Island to her Majesty have the effect of destroying such right or title if it previously existed?¹⁶

In the case now before the Court, consistent and exclusive use of the locus in quo has been clearly shown from time immemorial. . . . That the use to which the Maoris appropriated this land was to them of the highest value no one acquainted with their customs and manner of living can doubt. It is very apparent that a place which afforded at all times, and with little labour and preparation, a large and constant supply of almost the only animal food which they could obtain, was of the greatest possible value to them; indeed of very much

¹⁵ Ibid 230.

¹⁶ Ibid 239.

greater value and importance to their existence than any equal portion of land on terra firma. It is easy to understand then why the word 'fisheries' should appear so prominently in the instrument by which they admitted a foreign authority to acquire rights of sovereignty over their country. . . . The Court is of the opinion that the rights which these claimants and their ancestors, from the earliest times, exercised over this parcel of land, constitute a privilege or easement, which is included in the word 'fishery' used in the treaty; but whether their possession of these mudflats was sufficient to make a title to the soil itself, will remain for the inquiry.¹⁷

There is probably no case of a colony founded in precisely the same manner as New Zealand, i.e., by contract . . . , the Crown of England obtaining the sovereignty or high domain, and confirming and guaranteeing to the aborigines the useful domain, or the use and possession of all the lands. Vattel certainly speaks of Penn's treaty . . .¹⁸

[It will not] avail to say, with Mr. Hesketh, that native land is allodium. I believe that allodium exists in some parts of the Shetland Isles at the present day, but I am not aware that our Courts have ever furnished any illustration of the laws which regulate it. Nor do I profess to be certain what would be the effect upon our case of declaring this land subject to allodium.¹⁹

I must again express my hope that a case of so much importance will not be allowed to rest on the opinion of any Court except that of the highest in the land. Lyttelton's maxim that 'the honour of the King is to be preferred to his profit' has not been forgotten, but it appears to me that there can be no failure of justice if the natives have secured to them the full, exclusive, and undisturbed possession of all the rights and privileges over the locus quo which they or their ancestors have ever exercised; and the Court so determines, declining to make an order for the absolute propriety of the soil, at least below the surface.²⁰

Fenton speaks as one who is part of a conversation. This is particularly apparent at the outset he says: 'influenced by the hope that it may be the wish – as the Court thinks it is the duty – of the parties to apply to the Supreme Court to review this judgment'. The conversation is a complex one, for it concerns, among other matters: the relationship between the Court and Parliament and between the Court and the

¹⁷ Ibid 240-41

¹⁸ Ibid 242.

¹⁹ Ibid.

²⁰ Ibid 245.

Supreme Court; the status and meaning of the Treaty of Waitangi; the status of Maori custom; the place of various authorities, including Vattel, in all of this. Fenton sounds to me to be one who is almost overwhelmed by 'questions . . . involving such great responsibility and such important consequences'. He draws attention to the uniqueness of the case, not the least because of the unparalleled situation of the colony – 'There is probably no case of a colony founded in precisely the same manner as New Zealand'. This means self-conscious creativity in the activity of classifying is called for, which is connected with the 'great responsibility' that I just referred to. Fenton is not working with a well-worn road here, and he says so, partly in his expression of doubts. In all of this and more, Fenton sounds to me like he is engaging in an explorative inquiry with an open mind and with the principal aim of doing 'justice' to the parties involved. His tone is conciliatory and modest. What more should one *hope* for from a judge?

Contrary to Fenton's 'hope', the parties did not apply to the Supreme Court to review his judgment. I have been unable to locate any material that sheds light on why. It may well be that the parties agreed with Fenton that 'there can be no failure of justice if the natives have secured to them . . .' If they were around today, they may well agree with me that Fenton offers a statement that makes it plain that their respective claims have been listened to (*Listening) and have received a carefully thought through juxtaposition. With his engagement and respect and authentic judgment Fenton has done the parties justice. In all of this, it seems hard not to speak approvingly of the judgment, which ever 'side' one is on.

* * *

In *Heracles' Bow* White says more about the enterprise of judicial criticism as it concerns 'result' and approval. At the outset, White seeks to avoid being 'misread':

I should perhaps . . . make explicit, although it should be obvious enough, that my account of law is not meant to be a description of the way it is actually practiced by most judges and lawyers but a representation of the possibilities I see in this form of life both for its practitioners and for the community at large. My apology for the possibilities of the life of the law should be taken as an elaboration of the hopes I think we can and should have for

the law and for ourselves as lawyers, which may in fact serve as a ground upon which a criticism of law at once idealistic and realistic can rest.²¹

With his 'hope'-centered 'can and should' and 'idealistic and realistic', White mixes the familiar talk about the supposedly separate 'is' and 'ought' in a manner that would make uncomfortable those who might be drawn to the slogan 'Law is law'.

Back to 'result' talk. White suggests that we will do well to make some vital distinctions when talking about 'the meaning' of a judicial opinion:

There is . . . [a] sense in which the meaning of an opinion lies more in its performance than in its message, suggested by the fact that our practices of judicial criticism often focus less upon the result of an opinion (its 'message') than upon something that happens in the text, which we see as its more important meaning. The judicial critic of the sort I was trained to become learns to ask not only, 'Do I agree with this result in this case?'—this affirmance or this reversal—but also 'What do I think of this opinion as an opinion, as a piece of law-making?' The first question, however important, is 'merely substantive,' and on it legitimate questions can vary widely; the second is our uniquely professional question. This is a claim to neutrality on political issues, to professionalism, and to a special kind of knowledge. In order to focus students' attention on this aspect of judicial criticism, I have sometimes asked them to explain, in writing, what they admire in a particular opinion, the result of which they would vote against; and what they condemn in a particular opinion that 'comes out' in a way they approve. This is a way of defining excellence not in terms of 'results' but in terms of the composition: what the case is made to mean; how the judge defines himself or herself as a judge; what possibilities for argument and life the opinion holds out to the future; and so on.

To look at the opinion this way is to open up a set of questions about 'excellence' in the judicial opinion as a form of thought and life, on such topics as fidelity to facts and to law; openness to the contraries of the case, and hence to what can fairly be said against one's own result; the processes of reasoning by which the past is interpreted and brought to bear on the present; the degree to which the court recognizes the legitimacy and humanity of the litigant (especially the losing litigant) and fairly judges the legitimacy of his or her point of view; the way the court defines the legislature, the lower court, the jury, and the lawyer, and the sort of relations it establishes among them; and so on. From this point of view . . . the most

²¹ *Heracles' Bow* xv.

important 'result' in an opinion is not the judgment it reaches but the character the court gives itself in its writing and the opportunities for thought and community that it creates.²²

White's questions relating to 'composition' challenge those who ask questions based on an assumption that there exists a simple opposition of style (or form) versus substance or that there is no line whatever between law and politics. The claim by some legal scholars that the line between law and politics is non-existent can, I believe, be imagined as a failure of the imagination, a failure to ask 'our uniquely professional question'.²³ That question directs attention to an *activity* ('something that happens in the text'; 'a piece of law-making'), an activity that the reader can participate in, if she or he is willing and able to 'focus' her 'attention' on it. Just as a court 'creates' a 'character' for itself in its writing, so too does its reader in her (or his) reading. To attend to the reader this way is to open up a set of questions about 'excellence' in reading the judicial opinion as a form of life and thought. A central question is this: what can and should she hope to become?

* * *

In *Doing What Comes Naturally* (1989), Stanley Fish joins scholars from various disciplines in coming to 'the conclusion . . . that we live in a rhetorical world'.²⁴ This conclusion, he says, comes from accepting 'the thesis . . . that there is no such thing as literal meaning, if by literal meaning one means a meaning that is perspicuous no matter what the context and no matter what is in the speaker's or hearer's mind, a meaning that because it is prior to interpretation can serve as a constraint on interpretation.'²⁵ Fish identifies his book as a contribution to 'anti-foundationalist' thought, which claims 'not that there are no foundations, but that whatever foundations there are (and there always are some) have been established by persuasion, that is, in the course of argument and counter-argument on the basis of

²² Ibid 117-18.

²³ The failure can be heard more than once in D Kairys (ed), *The Politics of Law: A Progressive Critique* (1982; 1990) 6. Kairys might well dispute White's talk about 'neutrality on political issues', but there is a conversation to be had about the meaning of neutrality, a conversation that can begin with White's questions about 'character', questions Kairys does not ask.

²⁴ S Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) 25.

²⁵ Ibid 4

examples and evidence that are themselves cultural and contextual.’²⁶ Such thought will be unsettling for those who pursue rational knowledge, with ‘rational’ being beyond the contingencies of mere ‘persuasion’. Fish speaks of ‘anti-foundationalist theory fear’, which is expressed by those who imagine ‘the consequences of anti-foundationalist theory’ to be ‘disastrous and amount to the loss of everything we associate with rational inquiry: public and shared standards, criteria for preferring one reading of a text or of the world to another, checks against irresponsibility, etc.’²⁷ Fish suggests that such imagining is delusive:

But his follows only if anti-foundationalism is an argument for unbridled subjectivity, for the absence of constraints on the individual; whereas, in fact, it is an argument for the situated subject, for the individual who is always constrained by the local or community standards and criteria of which his judgment is an extension. Thus the lesson of anti-foundationalism is not only that external and independent guides will never be found but that it is unnecessary to seek them, because you will always be guided by the rules or rules of thumb that are the content of any settled practice, by the assumed definitions, distinctions, criteria of evidence, measures of adequacy, and such, which not only define the practice but structure the understanding of the agent who thinks of himself as a ‘competent member.’ That agent cannot distance himself from these rules, because it is only within them that he can think about alternative courses of action or, indeed, think at all.²⁸

Fish’s claim about anti-foundationalism being ‘an argument for the situated subject’ sounds persuasive to me. Fish, however, fails to explicitly address the topic of justice, which could involve making distinctions concerning the way different ‘agents’ *relate* to ‘rules’. Such distinctions could be talked about in terms of an agent’s ‘distance’ from the rules, but Fish fails to do so because he confines himself to a simple ‘within’-without distinction.²⁹ This matter of relationship is a path that White takes, a path that takes him to the topic of voice. We will come back to voice talk in a minute.

After claiming that ‘anti-foundationalist theory fear’ is unwarranted, Fish goes on to make a similar claim concerning ‘antifoundationalist hope’:

²⁶ Ibid 29.

²⁷ Ibid 322-23.

²⁸ Ibid 323.

²⁹ For a suggestive critique of Fish in relation to the inside/outside distinction, see P Schlag, ‘Fish v. Zapp: The Case of the Relatively Autonomous Self’ (1987) 76 *Georgetown Law Journal* 37, 55-57.

Neither can antifoundationalism have the consequences for which some of its proponents *hope*, the consequences of freeing us from the hold of unwarranted absolutes so that we may more flexibly pursue the goals of human flourishing or liberal conversation. The reasoning behind this hope is that since we know that our convictions about truth and factuality have not been imposed on us by the world, or imprinted in our brains, but are derived from the practices of ideologically motivated communities, we can set them aside in favor of convictions that we choose freely. But this is simply to imagine the moment of unconstrained choice from the other direction, as a goal rather than as an abyss. Ant-foundationalist fear and anti-foundationalist hope turn out to differ only in emphasis. Those who express the one are concerned lest we kick ourselves loose from constraints; those who profess the other look forward to finally being able to do so.³⁰

For Fish, 'to imagine . . . unconstrained choice' is to direct one's imagination in a delusive direction. That seems to me to be Fish's position, a position that seems sound to me. But are there possibilities for thinking about one's relationship with constraints that Fish has failed to imagine? Perhaps a more interesting question is this: How might we judge reconstitutions of constraints through an engagement with them? That question opens the door to the topic of justice: Does an agent act justly through her or his use of constraints? With that question in mind, the desire to 'more flexibly pursue the goals of human flourishing or liberal conversation' may be imagined as a reasonable anti-foundationalist hope. We might wonder how Fish imagines his own work. For example, with what hopes, if any, does he speak?

In *There's No Such Thing as Free Speech* (1994), Fish talks about one legal commentator's 'flirtation' with 'antifoundationalist hope' being 'a fully developed romance in the work of James Boyd White.'³¹ After the passage of his that is quoted in the Introduction to this Thesis, Fish says this:

White's mistake is to conflate the perspective from which one might ask questions about the nature of law (is it formal or moral or rhetorical) with the perspective from which one might ask questions in the hope that the answers will be of use in getting on with a legal job of work. It is from the first perspective (the perspective of metacritical inquiry) that one might

³⁰ Fish, *op cit*, 323.

³¹ S Fish, *There's No Such Thing As Free Speech and it's a Good Thing, Too* (1994) 172.

decide that the law is a process in which 'we, and our resources, are constantly remade by our own collective activities; but those who are immersed in that process do not characteristically act with the intention of furthering that remaking, but with the intention either of winning or deciding. With respect to that intention, an account of the law's rhetoricity will either be irrelevant (i.e., it does not touch on the issues the case raises) or dangerous (introducing it could weaken the position you are defending) or, in some circumstances, marginally helpful (as when you remind yourself and your fellows that the law is not an exact science and is less severe than science in its demand for proof). But even in this last instance, the thesis of the law's rhetoricity will not have generated a new way of practicing law; it will merely have added one more resource to a practice that will be shaped, in large measure, by the goals the law will continue to have, the goals of winning an argument or crafting an opinion. These are result-oriented activities, and to engage in them seriously is to have already foreclosed on the openness to alterity that White would have us adopt.

White doesn't see this because he thinks that if openness to alterity characterizes the law (as opposed to the more closed characterizations offered by more formalist theorists), then legal actors should themselves be open; since history shows that the law 'provides a ground for challenge and change,' it is with the motives of challenge and change that we should act. But while challenge and change are often the by-products of the resourcefulness legal actors display, they are not the motives for which legal action is usually taken. It may be, as White contends, that, as a rhetorical process, the law can never be closed to the interpretive pressures of alternative conversations and displays a 'structural openness,' but it does not follow that those who practice the law do so with the intention of being thus open. That is the intention of those who would practice a form of critical self-consciousness. As it turns out, this is precisely the future White envisions for the law: the legal agent will continually 'doubt the adequacy of any language, and seek to be aware of the limits of her own forms of thought and understanding': she will be committed to 'many-voicedness' and be profoundly against monotonal thought and speech, against the single voice, the single aspect of the self and culture dominating the rest.' White calls this vision 'rhetorical,' but it is a strange rhetoric that imagines conflict finally dissolved in the wash of many-voiced pluralism. The truth is that White's hopes for the law are not rhetorical, but transcendental; he regards the scene of persuasion as only temporary, and . . . he looks forward to a time when all parties will lay down their forensic arms and join together in the effort to build a new and more rational community. This 'commitment to openness,' this determination to 'be tentative and poetic,' may be admirable, but it is hard to see what place it could have in a process that *demand*s single-voiced judgments, even if that voice can be shown to be plurally constituted.

White may begin by acknowledging and celebrating difference, but in the end he cannot tolerate it.³²

Fish here seems to imagine a world in which theory and practice are separate spheres of life. White's 'mistake' he claims, 'is to conflate' questions of theory ('questions about the nature of law') with questions of practice ('questions . . . [relating to] getting on with a legal job'). The metaphor 'conflate' may not do justice here, for the image of fusing together suggests that there are two separate spheres in the first place. The 'and' in the phrase 'theory and practice' may have an infelicitous disjunctive effect, just like the 'and' in the phrase 'law and literature'. Fish seems oblivious to this possibility. Had he been *open* to the *possibility* that his categories are clumsy, he might not have jumped to the conclusion that White 'imagines conflict finally dissolved in the wash of a many-voiced pluralism.' Why does Fish find it difficult to reconcile a 'commitment to openness' with 'a process that *demands* single-voiced judgments'? I would say that what Fish means by the term 'single-voiced' is not what White means by the term. White is concerned with a monological, authoritarian manner, which is *not* necessary for 'a legal job of work'. White indeed suggests that such a manner undermines that which is worthy of being called 'legal' (*Voice). Had Fish attended to the limits of the categories he uses to talk about White, and in doing so expressed a voice of doubt about the justness of his reading, he would have begun to enact the polyphonic voice that White seeks to define and commend. Had Fish expressed doubt about the justness of his reading, he would have at the same time made a place for talking about hope: the hope of doing justice, in the sense of having made a reasonable effort at having attuned himself to White's way of imagining the law.

In that reading of Fish's reading of White, I may of course be wrong. I may have failed to catch Fish's drift, not the least because my categories may deafen me to what he is driving at. I may be failing to catch White's drift for the same reason. My efforts to connect Fish's way of imagining the law and White's way are constrained by my imagination, which may well be delusive and incapable of doing justice to either of their approaches to law. But I do hope to have done both of them justice.

* * *

³² Ibid 173-74 (endnotes omitted).

The activity of hoping has a particularly significant place in *Acts of Hope*, as its title suggests. White's reading of the United States Supreme Court case *Planned Parenthood v Casey*³³ will be of value to those who would like more food-for-thought on the limits of Fish's imagination. (White's reading may be of value to those who would desire a response from Sanford Levinson's claim, in a review of *Justice as Translation*, that 'there may simply be no way to "integrate" the dazzlingly different perspectives of the "pro-choice" and "pro-life" adversaries in the abortion debate.'³⁴)

Casey concerns a woman's constitutional 'liberty' to choose to terminate a pregnancy. The authority of the well-known case *Roe v Wade* is at issue, and this had some considerable significance given that the Court now had four justices who had been nominated by Presidents Reagan and Bush, both of whom had sought to appoint justices who would overrule the case. The Court explicitly addressed the topic of stare decisis and discussed it at length, providing a base for one of the most extraordinary judicial opinions in the history of American constitutional law. This is the Joint Opinion of Justices Kennedy, O'Connor, and Souter, all of whom were nominated by either Reagan or Bush. The Justices made an authentic decision, at least in the sense that they resisted any suggestion that no other decision was possible. They stressed '[t]he inescapable fact . . . that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts have always exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule.'³⁵ In resisting overruling *Roe*, the Justices touched on the issue of what it means to believe in the rule of law:

Our analysis would not be complete . . . without explaining why overruling *Roe*'s central holding would . . . seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. To understand why this would be so it is necessary to understand the source of this Court's authority, the conditions necessary for its preservation, and its relationship to the country's understanding of itself as a constitutional Republic.³⁶

³³ *Planned Parenthood v Casey* 505 US 833 (1992).

³⁴ S Levinson, 'Conversing About Justice' (1991) 100 *Yale Law Journal* 1855, 1865. I engage with Levinson's review below – *Integration.

³⁵ *Planned Parenthood*, op cit, 849.

³⁶ Ibid 865.

With these words the Justices invite their readers to ask questions beyond those on the merits of the case, such as whether abortion is murder.

White takes up their invitation. Doing so, perhaps needless to say, will be problematic (to say the least) for some people, who will feel that other questions are irrelevant to what is at stake. What hopes could such people have in bothering to read what White has to say? Let us try to imagine. Here is one fragment:

In a final section of its opinion, before reaching the particular provisions of the Pennsylvania statute before it, the Court expands on what it thinks is at stake in its decision: the legitimacy of the Court itself, and its capacity to perform its essential and unique role in our democracy. To discharge its responsibilities and maintain its position the Court must seek to decide cases on the ground of principle, or what it earlier called 'reasoned judgment,' and it must be seen to do so. 'The Court must take care to speak and act in ways that allow people to accept its decision on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.' Essential to this goal is respect for the decisions of the past; frequent overruling of its own decisions would be a statement by the Court itself that they were not entitled to respect.

Where, as here, the Court decides a matter intensely divisive of our polity, it is especially important to respect the choices that have been made in the past. 'Only the most convincing justifications' could demonstrate that an overruling in such a case was 'anything but a surrender to political pressure.' Once the decision is made, it is essential to live with it unless it is plainly wrong. This is the point where the Court comes closest to acknowledging the existence of the enormous forces at work in our country on this subject, referred to above, making it a focus of opposition that has some of the characteristics of a civil war itself. The extraordinary character of the issue makes principled judgment, and adherence to prior authority, all the more important. To reverse oneself under pressure will give the impression, perhaps correctly, that the Court is nothing but another vehicle for political life—and that, though they do not say so, the appointment of new justices can properly rest on purely political and result-orientated judgments rather than qualities of mind and character traditionally thought essential to the judicial role.³⁷

³⁷ *Acts of Hope* 176-77.

White here works hard to distinguish what we call 'the legal' from 'the political'. Of course 'the legal' has a 'political' element in the sense that judges are not neutral machines working with fixed rules, but there are, as White suggests, different kinds of 'politics' that can and should be judged. He is resisting those who would use the word 'politics' to stop what he considers to be a vitally important conversation, a conversation that IS 'the law', a conversation that can and should distinguish and judge different kinds of politics.³⁸

White goes on to say:

There follows now an extraordinary moment in the history of American law. The Court turns its mind to the way citizens respond to its decisions, especially those they disagree with. Of course it is easy to support the Court when it comes out your way, and of course many people who disagree respond with simple and continuing opposition or resistance. It is not with either of these groups that the Court concerns itself but with those who disagree with the result, yet 'struggle to accept it, because they accept the rule of law.' To them the Court must keep its promise; for if it does not, but reverses itself too easily, in the end 'a price [will] be paid for nothing.' The Court does not explicate this point further, but what they mean, I think, is this: they are imagining the moral drama that occurs when a person is opposed to a law yet respects it, a drama in ordinary life that is in fact the parallel of the one they are experiencing as judges. This drama is seen as a painful but also a good thing, good especially for the character of the person in question and for any community of such people. The reason it is good is that only at such moments is the commitment to the rule of law a meaningful one: when you agree with the law, there is no problem; when you resist and oppose, you are refusing to accord the law respect. Only when you disagree on an important matter are you given the opportunity to learn what respect for the law means and to engage in the moral practice of respecting it. Such a moment is a stage in the development of an essential ingredient of civic character; it is part of an education, not purely practical or

³⁸ Justice Scalia's dissenting opinion in *Casey* echoes problematic talk about law and its relation to politics. Here is one passage from it:

In truth, I am as distressed as the Court is . . . about the 'political pressure' directed at the Court . . . The Court would profit, I think, from giving less attention to the fact of this distressing phenomenon, and more attention to the *cause* of it. That cause permeates today's opinion: a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls 'reasoned judgment,' . . . which turns out to be nothing but philosophical predilection and moral intuition. (Op cit, 999-1000)

Here is a person who fragments the world into tidy and self-contained compartments. What place does Scalia make for talking about his own 'philosophical predilection and moral intuition' in his own engagement with 'text and traditional practice'?

intellectual or a matter of training but an education of the whole self. In this it would be recognizable by Plato and Aristotle, both of whom saw education as the development of the character through testing and the development of habit. A person who has been through the struggle the Court describes will know, as no one else really can, the importance of the rule of law itself; and having respected it against his own inclination, he will be in a position to insist that others respect it against theirs.

On such a view of civic life in general, and of the activity of the Court as well—for as I say, the Court is talking about itself here—the Court is resisting many tendencies of our culture: the attitude stimulated by the consumer economy, and given theoretical standing by certain schools of economics, that reduces all choices to preferences and treats them all as equal; the comparable view in the political arena, that democracy means the collective preferences of the majority, however uneducated or biased it may be; the way in which certain political candidates, especially for the presidency, address the voting public by trying to stimulate whatever feelings will move it to vote for them, however impossibly simplistic the language in which they do so; and, when we come to the Court, the view that it is really just another political agency, to be staffed by those who will carry out the president's political agenda, and that all its opinions are really just the rationalization of the exercise of power. The Joint Opinion resists all of those assumptions, seeing in the citizen a capacity for responsible tension and growth, in the process of law—especially in the work of the Court—a source of education for itself and the polity. It defines the life of a citizen as an ethical drama, and its own life as one too, providing a basis on which one can find possibilities for meaning in our shared life that are worthy of humanity. So read, this opinion enhances the dignity of the Court and the nation alike.³⁹

The image of 'a painful but . . . good' process of 'struggle' brings to mind the commonly-used slogan, 'No pain, no gain.' For one who might find it difficult to get beyond the sense that abortion is murder (I am not claiming that abortion is not murder), hearing the slogan may make the difficulty even more greater. But perhaps value can be found in the common. 'No pain, no gain' brings to mind *activity* (*Activity). Both the Court and White are at pains to direct attention to 'the law' (in the phrase 'the rule of law') not as an object but as an activity. This activity is an educational one. Their image of education is against the mechanical, the inflexible, the routine – all that stifles 'growth'. They value an education that invites attention on

³⁹ *Acts of Hope* 177-79.

working out ‘possibilities for meaning in our shared life that are worthy of humanity.’ Such an education is an enterprise of the imagination. What place, we might do well to ask economic imperialists, does such an education have in the dominant image of *Homo economicus*? (Are the economic imperialists lacking such an education?) Do we not need to re-imagine *Homo economicus* as a ‘citizen’ with ‘a capacity for responsible tension and growth’?

‘What is *really* meant by “commitment to the rule of law”’, some might now ask. After further comment on those who contributed to the Joint Opinion, White says:

The rule of law they describe is enacted in the process in which they engage both themselves and their reader; it is in this mode of thought and life, not on mere statements or commands, that they imagine the law’s authority.⁴⁰

The rule of law, that is, is in a process of becoming through our hope-full efforts to ‘imagine’ and re-imagine it. This may be disturbing to a person who imagines the imagination to be a faculty that is at odds with rational thought. White invites such a person to re-imagine the imagination.

White’s friend and colleague Milner Ball found himself unable to join White expressing approval for the Court’s opinion in *Casey*. In a ‘dialogue’ between the two, White addressed why they disagreed. This included attending to the question that seems to him to be the most important question:

I would like to begin with a question: Can you imagine an opinion coming out with the result that *Casey* reached that you would admire and respect? If not, I think you are saying that abortion is an issue on which there is for you only one tolerable answer. So read, your question is an eloquent and passionate defense of the woman’s right to choose whether or not to terminate the existence of a fetus within her.

The problem the law faces is that there are other people who maintain the opposite position with equal passion and eloquence, namely that abortion is the murder of an unborn child and that it should never, or almost never, be permitted. I think we cannot expect the two sides to agree on what they regard as the merits of the case. What the law can hope to do is offer them something else on which they can agree, namely that decisions made by

⁴⁰ Ibid 181-82.

certain lawmakers, under certain conditions should be granted respect and obedience, even if one disagrees with the choice they have made.⁴¹

If the issue of '[w]hat the law can hope to do' is addressed first, then our reasons for disagreement may be more readily identified. In the process of coming to understand the disagreement we may come to sense that we agree on more than we realized. The 'dialogue' between Ball and White, a dialogue that can be imagined as a joint act of hope, suggests as much.

Before a case is decided, it may be fairly easy to get the two sides to agree that 'under certain conditions' a decision by a Court 'should be granted respect and obedience'. Difficulties may come afterwards: in getting the party for whom the Court did not give the result that they hoped for to remember and recommit to the agreement. Hopes are not static entities that can be pointed to but, rather, evolving processes that shift with our evolving expectations and experiences.

* * *

Any attempt to catch White's drift with regard to the place of 'hope' in his work would do well to attend closely to the first chapter of *From Expectation to Experience*. The chapter, which is titled 'Rhythms of Hope and Disappointment', begins as follows:

Let me begin with a repeated experience of my own, which is I think familiar to teachers of every kind. Whenever I start off to teach a course to law students—say Introduction to Constitutional Law, as I do each fall—I find myself having a set of very familiar feelings. I am full of intense and unreasoning hope. I am determined that I will be the best law teacher in the world; I believe that these students will be the best law students in the world; and I want this to be the best law class in the world, wonderful for us all. Yet, every time, there is built into the experience of the course a kind of minor heartbreak, certain to occur; for in the event I prove much less than perfect—missing chances to make sense of things, confusing issues, not hearing questions, failing to understand what is before me, and so on; and the students do too, missing easy points, not paying attention, coming in late, not understanding what anyone should understand, and so forth. At the end comes the depressing experience of the exam, and its grading, when I find myself forced to see the reality of my own work and theirs in a new way. From the perspective of my own religious tradition, you could say

⁴¹ *From Expectation to Experience* 165.

that we collectively act out the truth that we live after the Fall. Later on, my feelings change, and I come to think of the course with a sense of real though limited accomplishment; as valuable, though far from ideal. Once more I arrive at the confidence that this is worth doing after all.

Then, after a short break, I find myself starting off on a course again, full of the same hopes that are certain to be disappointed, as though I am some kind of fool who can't learn from his experience. Yet—and this is my main point—I think I am right to do this, that these unreasonable hopes are part of the essential gift that a teacher makes to his or her students, just as part the hopes on the other side are a part of the essential gift of the students to the teacher and to each other. Without the desire—and this requires a hope—to make the class wonderful, it would be much worse than it is. There is thus built into teaching a constant rhythmic shift between hope and disappointment, confidence and despair, concluding in temporary moments of more or less stable acceptance. This is part of the stuff of the teaching life, and in my view a good part.

But this is true not only of teaching: perhaps, indeed, this rhythm is present in every act of language. For there is a sense in which every statement or question is an act of hope, never to be perfectly realized: the hope that at last you will say the truth, or be understood, or receive a perfectly intelligible response. Every sentence promises in its structure an order, an intelligibility, that the world cannot keep, and expresses a hope, of being fully comprehensible and fully comprehended, that will never be met. For every attempt to communicate is across differences that can never be perfectly bridged. Think how much of a good marriage, after thirty years, remains a conversation, one aim of which is to bring the two languages, and the two people, still close together. But they never become one.⁴²

White here brings home with some force a sense that hope is an *activity* of hoping (*Activity),⁴³ an activity that has 'rhythms', an activity that, like all activities, is impossible to define fully, for it involves an experience that is by its nature inexpressible. That last sentence of mine can be read as an act of hope, for behind it was a hope that I would be understood by my reader, including 'myself'. Having just identified an act of hope on my part, I am reminded of how often I assume that my attempts to communicate will be perfectly understood by my reader. What an unreasonable person I have been! I hope that you have been equally unreasonable.

⁴² Ibid 1-2.

⁴³ For a suggestive discussion of hope as an activity, see P Shade, *Habits of Hope: A Pragmatic Theory* (2001).

* * *

Efforts to tune in to White's work, especially as it relates to the activity of hoping, can be aided enormously by Jeanne Gaakeer's *Hope Springs Eternal* (1998), which began as a dissertation on White's work. Gaakeer offers these remarks on her title:

When I started studying White's work, I soon found that it was permeated with the idea of hope. From my continental point of view, this is associated with the American dream in its most noble form. This idea and ideal for me are exemplified in Alexander Pope's famous lines from *Essay on Man*. I chose them for a title, and a motto for what has become this book, even before the publication of White's *Acts of Hope* confirmed my choice. I realized that I would run the risk of being misunderstood since 'hope springs eternal' for many people has become a cliché. It has been a metaphor that has been the subject of neglect, misunderstanding, or even abuse. Though it may seem paradoxical, that is at the same time the reason the phrase is so valuable for my project, since what White constantly does, and what I therefore want to show you, is warn against a reduction of language to cliché. Thus, I hope to draw your attention to the primary meaning of these lines and offer it as a metaphor for White's view on law.⁴⁴

Here is an act of 'hope' ('to draw your attention') relating to White's acts of hope. Gaakeer's title might contribute to a poorly attuned White critic (such as Sanford Levinson) becoming even more persuaded that White is a modern Pollyanna (*Integration). That metaphor, I hope you are persuaded, is inapt.

⁴⁴ J Gaakeer, *Hope Springs Eternal: An Introduction to the Work of James Boyd White* (1998) 12.

Image

‘For especially valuable work on the way we imagine the world’, White directs his reader to Kenneth Boulding’s *The Image* (1956).¹ Boulding’s book boldly sets out to establish a ‘new science’ founded on ‘the image’, a science that has ‘remarkable unifying power’.² We may do well to hope that reading Boulding can serve as a valuable resource for tuning in to White.

* * *

This is Boulding’s stated objective: ‘to discuss the growth of images, both private and public, in individuals and organizations, in society at large’.³ His principal reason for doing so is this: to ‘develop a really adequate theory of behavior.’⁴ For Boulding, ‘behavior depends on the image’.⁵ Some suggestive remarks on the nature of ‘the image’ are as follows:

The image is built up as a result of all past experience of the possessor of the image. . . . From the moment of birth if not before, there is a constant stream of messages entering the organism from the senses. At first, these may merely be undifferentiated lights and noises. As the child grows, however, they gradually become distinguished into people and objects. He begins to perceive himself as an object in the midst of a world of objects. The conscious image has begun. . . . As the child grows his image of the world expands. He sees himself in a town, a country, on a planet. He finds himself in an increasingly complex web of personal relationships. Every time a message reaches him his image is likely to be changed in some degree by it, and as his image is changed his behavior patterns will be changed likewise.⁶

¹ White’s directive resides in his ‘Imagining the Law’, in A Sarat and T R Kearns (eds), *The Rhetoric of Law* (1994) 29, 29.

² K Boulding, *The Image: Knowledge and Life in Society* (1956) 148.

³ Ibid 18.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid 6-7.

Boulding, we can take it, takes 'experience' seriously. He goes on to suggest that there is a complex relationship between experience and image. This relationship is intimately related with the flux of language and culture.

When 'a message' impacts an image, Boulding argues that 'one of three things can happen.'⁷ (1) '[T]he image may remain unaffected.' Here he invites us to 'think of the image as a rather loose structure, something like a molecule,' and 'we may imagine that the message is going straight through without hitting it.'⁸ (2) A message 'may change the image in some rather regular and well-defined way that might be described as simple addition.' Here he speaks of looking at an atlas and 'finding out exactly the relation of Nyasaland to Tanganyika.' The significance: 'I will have added to my knowledge, or my image; I will not, however, have very fundamentally revised it. I still picture the world much as I had pictured it before. Something that was a little vague before is now clearer.'⁹ (3) '[A] revolutionary change.' Here: 'a message hits some sort of nucleus or supporting structure in the image, and the whole thing changes in a quite radical way.' A classic example is a conversion: 'A man, for instance, may think himself a pretty good fellow and then may hear a preacher who convinces him that, in fact, his life is worthless and shallow, as he is at present living it. The words of the preacher cause a radical reformulation of the man's image of himself in the world, and his behavior changes accordingly.'¹⁰

In some extra remarks on image change, Boulding refers to the activity of reading:

Occasionally, things that we see, or read, or hear, revise our conceptions of space and time, or of relationships. . . . There are books, some of them rather bad books, after which the world is never quite the same again. . . . After reading Veblen, one can never quite see a university campus or an elaborate house in just the same light as before.

After reading Boulding, one may never quite hear talk about an image in just the same way as before. The world and one's place within it may never be quite the same again.

⁷ Ibid 7.

⁸ Ibid.

⁹ Ibid 7-8.

¹⁰ Ibid 8.

Boulding's book challenges the image of the world that makes a sharp distinction between talk about 'facts' and talk about 'values', a distinction that is associated with the sharp distinction between objective and subjective:

One of the most important propositions of this theory is that the value scales of any individual or organization are perhaps the most important single element determining the effect of the messages it receives on its image of the world. If a message is perceived that is neither good nor bad it may have little or no effect on the image. If it is perceived as bad or hostile to the image which is held, there will be resistance to accepting it. This resistance is not usually infinite. An often repeated message or a message which comes which comes with unusual force or authority is able to penetrate the resistance and will be able to alter the image. . . .

We do not perceive our sense data raw; they are mediated through a highly learned process of interpretation and acceptance. . . . What this means is that for any individual organism or organization, there are no such things as 'facts.' There are only messages filtered through a changeable value system. This statement may sound rather startling. . . . This does not mean, however, that the image of the world possessed by an individual is a purely private matter or that all knowledge is simply subjective knowledge, in the sense in which I have used the word. Part of the image of the world is the belief that his image is shared by other people like ourselves who are also part of our image of the world. In common daily intercourse we all behave as if we possess roughly the same image of the world. . . . The human organism is capable not only of having an image of the world, but of talking about it. This is the extraordinary gift of language.¹¹

We might say that the image of the world is in a process of becoming through efforts to make sense of it. 'The image', for Boulding, is not and cannot be a static entity. That at least, is my image of his image of 'the image'. His image of 'the image' is a product of 'the extraordinary gift of language', and we use language, as we are doing now, to make sense of it. In what sense is language an 'extraordinary gift'? Is Boulding trying to do what artists have done since time immemorial, namely, directing our attention to the extraordinary in the ordinary?

¹¹ Ibid 13-15.

When can someone, an academic or non-academic, say that she or he has acquired knowledge that has the quality of 'truth'? What is the place of 'science' in Boulding's image talk? In response to questions such as those, Boulding offers these remarks:

Most epistemological systems seek some philosopher's stone by which statements may be tested in order to determine their 'truth,' that is, their correspondence to outside reality. I do not claim to have any such philosopher's stone, not even the touchstone of science. I have, of course, a great respect for science and scientific method – for careful observation, for planned experience, for the testing of hypotheses and for as much objectivity as semirational beings like ourselves can hope to achieve. In my theoretical system, however, the scientific method merely stands as one among many of the methods whereby images change and develop. The development of images is part of the culture or the subculture in which they are developed, and it depends upon all the elements of that culture or subculture. Science is a subculture among subcultures. It can claim to be useful. It may claim to be good. It cannot claim to give validity.¹²

Boulding's 'theoretical system' is an open one, unlike the aspirations of some theorists who 'seek some philosopher's stone'. (Connected with 'stone' talk, in the final chapter Boulding writes: 'The difficulty with any correspondence theory of the truth . . . is that images can only be compared with images. They can never be compared with any outside reality.'¹³) Boulding goes on to summarize by saying that 'my theory might well be called an organic theory of knowledge.'¹⁴ This is a theory of knowledge that connects the knower and the known: 'Its most fundamental proposition is that knowledge is what somebody or something knows, and that without a knower, knowledge is an absurdity.'¹⁵

Boulding offers a series of chapters about 'the image' in various aspects of life, including: 'in the theory of organization'¹⁶; 'at the biological level'¹⁷; 'of man and society'¹⁸; 'the sociology of knowledge'¹⁹; 'in economic life'²⁰; and 'in the political process'.²¹ A fragment from what he says about 'economic life' is as follows:

¹² Ibid 16.

¹³ Ibid 165.

¹⁴ Ibid 16.

¹⁵ Ibid.

¹⁶ Ibid 19.

¹⁷ Ibid 32.

¹⁸ Ibid 47.

The economists have badly neglected the impact of information and knowledge structures on economic behavior and processes. There are good reasons, or perhaps one should say excuses, for this neglect. With deft analytical fingers the economist abstracts from the untidy complexities of social life a neat world of commodities. It is the behavior of commodities not the behavior of men which is the prime focus of interest in economic studies. . . . He studies 'the behavior of prices' (the phrase is actually used by economists) much as the astronomer studies the behavior of planets. Just as the astronomer, at least before the days of Einstein, was not particularly interested in the 'behavior of gravity,' because gravity was so well behaved it did not have any behavior, so the economist is not really interested in the behavior of men. . . . Even in the simplest theories of economic behavior, however, the concept of an image is latent. Economic behavior is conceived as a process of 'maximization.' . . . [I]n the simplest form, we suppose his mind to be like a department store full of images of commodities, each with a convenient price ticket attached. . . . [E]conomic man is also supposed to be able to give value-ordering to all relevant alternatives . . . Alternatives do not usually have the courtesy to parade themselves in rank order on the drill ground of the imagination. Our relational image is faulty at the best. Our image of the consequences of our acts is suffused with uncertainty to the point where we are not even sure what we are uncertain about. . . . There is a large field of investigation open, therefore, in the general area of the nature of economic perception, information, images, and transformation of the image.²²

This 'field of investigation' is one in which Thorstein Veblen and John Commons (the pioneers of the movement called 'Institutional Economics'²³) took seriously. Both were interested in economic evolution, and their 'evolutionary' work suggested that there was no tidy range of activities that could be carved out as 'economic'. Boulding's work on the image suggests the same. This work offers to disturb habitual modes of thought that are generally not recognized as such. Attention on 'the behavior of men' might uncover the visible hand in the reified abstraction that economists and non-economists alike call 'the market'. What is called 'the behavior of prices' is not

¹⁹ Ibid 64.

²⁰ Ibid 82.

²¹ Ibid 97.

²² Ibid 82-86.

²³ Boulding engaged with the work of Veblen and Commons in his 'A New Look at Institutionalism' (1957) 47 *American Economic Review* 1.

independent of the behavior people in society towards each other in their efforts to influence lawmakers in the assignment of rights and liberties for bargaining over the ownership of 'commodities'. Boulding's theory of the image invites some considerable change in the way many economists image 'the economy'.

Boulding imagines his work on 'the image' as offering a framework that has 'remarkable unifying power'.²⁴ He offers nothing less than a 'foundation [for] a new science'.²⁵ He proposes a name for it:

As I am indulging in the symbolic communication of an image of images I will even venture to give the 'science' a name – Eiconics – hoping thereby to endow it in the minds of readers with some of the prestige of classical antiquity. I run the risk perhaps of having my new science confused with the study of icons. A little confusion, however, and the subtle overtones of half-remembered associations are all part of the magic of the name.²⁶

Here Boulding suggests what we users of language seemingly all know at some level: the use of a new word has no meaning to a hearer until she connects it with some aspect of her own experience. Different people will naturally have different experiences, and thus the meaning of the word will differ from person to person. Some self-identified 'scientists' might do well to remind themselves this when they get hung-up on the meaning of the 'magic' word 'science'.

Boulding stresses that his 'new science' is 'not particularly new'.²⁷ He goes on to make some connections:

I will begin with economics, which is the field I know best and which, alas, I must confess, has contributed least. The tradition of economics is pretty sharply anti-eiconical and mechanistic. . . . I am familiar with only two . . . pieces of work in economics which make any serious attempt to contribute to this problem. The first is an essay by F. W. Hayek, the second is the work of the economic psychologist, George Katona. To these men I offer – whether they accept it or not – the honor of being the first eiconists in their field. . . .

²⁴ Boulding, op cit, 148.

²⁵ Ibid 148.

²⁶ Ibid 148.

²⁷ Ibid 149.

Eiconics has somewhat deeper roots in sociology, especially in the sociology of knowledge. . . . The two names principally associated with the sociology of knowledge in Germany are Max Scheler . . . and Karl Mannheim. . . .

Psychology started out with an image of the mind as a sort of jigsaw puzzle of ideas. The science took a firmly anti-eiconical turn, however, with the development of behaviorism. . . . With the coming of the Gestalt school, however, psychology began to take a sharply eiconical direction. . . . Social psychology has been eiconical almost from the start. It may be indeed that George Mead will have to be given credit for being the first eiconist. . . .

The most eiconical of all the 'official' disciplines is, of course, psychoanalysis. It is, indeed, almost the whole business of the psychoanalyst to explore the image, both conscious and unconscious, and his therapeutic method depends largely on the theory that the subconscious should be brought into consciousness.²⁸

Boulding's work on 'the image' suggests the basic point that as human beings we ceaselessly image and re-image the world. He suggests that academics from all walks of life will do well to attend to this fact. The establishment of a discipline called eiconics would help make our ways of imaging the world, and our action within it, the matter of critical thought and expression.

Boulding's eiconics offers to bring together every discipline in the entire university. This seems to me to be an extraordinary act of the imagination, one which would give the imagination a central place in talk about experience, meaning, reasoning, and understanding.

* * *

Eiconics has yet to become the name of an established science. The rehabilitation of rhetoric, however, can be imagined as an eiconical turn (*Rhetoric). The turn to rhetoric has much potential for a widespread revolutionary re-imaging in the economics tribe. Deirdre McCloskey, one of the few who have explored the relations between *Homo economicus* and *Homo rhetoricus*, tells this suggestive conversion story in *The Missing Ethics of Economics* (1996):

As a Chicago economist sitting in the Social Science Building on 59th Street around 1975 I started to worry about the 'methodology' of the school, which even then seemed to be

primitive. I read some philosophy of science, especially Karl Popper, but didn't see how it could help. Then in 1979 I read, on the advice of Wayne Booth in English at Chicago, some 'rhetoric' and in a flash (it seemed to me) it was clear. Economics had a 'rhetoric,' which is to say a mode of persuasion. But when you think about it – and it took me years to figure this out – if economics (or physics or mathematics: it's not about 'hardness') is rhetorical, then it's not so different from cultures of discourse in other fields, such as literature or philosophy. Economics uses metaphors. Economists call them 'models.' But then it dawned on me – slowly, slowly – that economics also uses another figure of thought, stories. Economists don't call their stories anything, because they are not used to thinking of stories as part of thought. Only then did I start seeing what's wrong with an economics that omits ethics. The ethical theories that most appealed to me were narrative – not the Platonic or Kantian ethics of abstract rules but an Aristotelean or a feminist ethics of who you are, and what sort of virtues such a person might have.²⁹

McCloskey, we can be sure, would not have us kill off *Homo economicus* but rather re-image her (or him), and in doing so recognize that we have the responsibility as rhetors to constantly reconstitute her in 'story', as we reconstitute ourselves in the process. We would do well, McCloskey suggests, to begin the reconstitution by replacing Jeremy Bentham's 'utility' with Adam Smith's 'prudence', a virtue which Smith placed between the virtues of 'temperance' and 'justice'.³⁰

A justice-seeking economics could begin, say, not with 'How much utility can I get?' but 'Upon what understandings do we listen?' McCloskey's colleague Arjo Klamer is much of this mind. His pioneering book of 'conversations' with economists about 'new classical' economics, published in 1984, has much to offer a new science of economics. Let us attend to Klamer's conversation with Leonard Rapping, who switched from working closely with 'new classical' economist Robert Lucas to working as an eclectic economist. Klamer introduces Rapping this way:

Leonard Rapping occupies a special position, partly because he worked with Lucas just before the take-off of new classical economics, partly because of his radical views now. But

²⁸ Ibid 148-52.

²⁹ D N McCloskey, 'The Missing Ethics in Economics' in A Klamer (ed), *The Value of Culture: On the Relationship between Economics and Arts* (1996) 187, 188.

³⁰ D McCloskey, 'The Demoralization of Economics: Can We Recover from Bentham and Return to Smith?', in M A Fineman and T Dougherty (eds), *Feminism Confronts Homo Economicus: Gender, Law, and Society* (2005) 20.

mainly I am interested in his conversion from conventional to radical economics. His story nicely illustrates the importance of personal and social factors in economic discourse.³¹

Klamer's use of the word 'conversion' seems apposite to me. The Latin root of the word 'conversion' means to 'turn around' or 'transform', indicating the 'radical' nature of this event. As we shall hear, Rapping's change was quite radical.

In hearing Rapping's 'story' and placing it next to Lucas' 'story', Klamer establishes connections between people of different experience, and in doing so he offers his reader an experience. What kind of experience? Lucas, or at least the Scientist within him, might well have thought that Klamer's 'conversations' were of a colloquial nature. But Klamer is offering an interchange that is just as serious as Lucas' Scientific work – science without the capitalization. He is inviting a 'conversion' not to 'radical' economics but to 'rhetorical' economics, which for his implied audience would be a profound change in belief and action in relation to what we conceive of as reality.

Klamer turned to Rapping with 'wonder' about 'why' his 'change occurred and what personal and social consequences it entailed.'³² Let them converse, beginning with Rapping:

I accepted the view that the US was making the world safe for democracy, that the US would develop the Third World Friedman's book *Capitalism and Freedom* was very important to me. I believed in it. The thing that impressed me most about Friedman was his emphasis on freedom. His view was consistent with the American dream, the dream about a land of freedom and opportunity. I must say that I did feel free until the late 1960s.

. . . I became interested in the issues revolving around the war in Indo-China and became increasingly involved in the anti-war movement. I began reading a lot about Indo-China; I started looking for an explanation of the war . . . And I began to see the nuclear problem as *the* social and economic problem of our time. . . .

. . . I pretty much began to disassociate myself from most of my colleagues. My involvement in these issues was embarrassing to a lot of them. I was already a full professor and had a lot of privileges. I was well paid; I had a light teaching load. . . . There was a profound contradiction between my privileges and my beliefs. I quit Carnegie in 1973,

³¹ A Klamer, *The New Classical Macroeconomics: Conversations with the New Classical Economists and their Opponents* (1984) xi.

³² Ibid 218.

because I couldn't stand the dissonance any longer. I was lucky to have another job. I could afford principled positions.

You must have discovered that something was wrong with Chicago economics.

I discovered that the war was wrong; I came to the conclusion that it was an illegitimate war and America was an imperial power. That disillusioned me. In all my training at Chicago there was no serious mention of the global system. . . . I jettisoned Chicago economics. But it left me in an intellectual vacuum. . . .

It was an awful experience. . . . I had never experienced depression before; I did then. It took me many years to recoup from that. . . . It was a dark and painful period. It was hard. I was afraid. Everything that I had learned seemed inadequate, given the war. . . . I would never again embrace an extreme ideology. . . .

Why did you go to the University of Massachusetts in Amherst?

. . . The department was ecumenical. Ideologically diverse points of view were represented. It was the perfect environment to inquire about the world. This was the beginning of a profound education for me. Without the experience of changing values I would not have grown intellectually and morally. . . .

I tell you, the reconstruction of a worldview is a long, slow process. It is also a wrecking experience. The process is never completed. I am eclectic and sometimes inconsistent. . . .

Why do you think that [Lucas and Sargent] don't respect your work in light of the fact you are all intelligent people with a common interest?

. . . It may be that one's thinking gets forced into a certain metaphor and one then must always argue in these terms. However, if you let your mind go, there are many possibilities.³³

At what seems to me to be the deepest level of his existence, the metaphors that Rapping lived by have changed. As Klammer suggests at various points, when Rapping worked with Lucas, he lived principally by mechanistic metaphors, and he was not conscious of doing so (*Metaphor). He then deliberately embraced organic metaphors.

³³ Ibid 222-233.

Rapping became interested in, or rather committed to, a process of self-cultivation. He senses that a self worthy of the name is not a single unit but a 'process' of becoming. A nurturing 'ecumenical' environment is crucial here. The image of *Homo economicus* can begin to become whole through such an environment.

* * *

The Legal Imagination has much to offer those who wish to give content to the phrase 'thinking like an eiconist'. Eiconics, we might say, begins by getting lost in the game of question and answer (*Questioning). Let us do this in a section on 'the activity of argument'.³⁴ One set of questions invites an engagement with a response to Stephen Douglas' response, in Springfield 1858, to Abraham Lincoln's 'House Divided' speech, in which he accepted his nomination to run against Douglas for the United States Senate. Here is a fragment of what Lincoln said:

If we could first know *where* we are, and *whither* we are tending, we could be a better judge *what* to do, and *how* to do it.

We are now far into the fifth year, since a policy was initiated, with the *avowed* object, and *confident* promise, of putting an end to slavery agitation.

Under the operation of that policy, that agitation has not only, *not ceased*, but has *constantly augmented*.

In *my* opinion, it *will* not cease, until a *crisis* shall have been reached, and passed.

'A house divided against itself cannot stand.'

I believe this government cannot endure permanently half *slave* and half *free*.

I do not expect the Union to be *dissolved* – I do not expect a house to *fall* – but I *do* expect it will cease to be divided.

It will become *all* one thing, or *all* the other.

Either the *opponents* of slavery will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction, or its *advocates* will push it forward, till it shall become lawful in *all* the states, *old* as well as *new* – *North* as well as *South*.³⁵

³⁴ *The Legal Imagination* 806-58.

³⁵ Quoted in W Mieder, "'A House Divided': From Biblical Proverb to Lincoln and Beyond", in W S Brown (ed), *Understanding Wisdom: Sources, Science, & Society* (2000) 57, 70.

Douglas' response, for White, is 'a remarkable achievement'.³⁶ The speech is too long to reproduce here, but we can catch a sense of it in White's questions, some of which are as follows:

1. The ultimate question is the principle of self-government,' the right of a people to choose the constitution and laws under which they must live, which Douglas affirms and Lincoln denies. How would you respond on behalf of Lincoln?
2. At stake is equality among the states and adherence to our Constitution which gives them equal powers over their own affairs. Lincoln cannot achieve this goal – the extirpation of slavery – without a national despotism utterly destructive of our principles of federalism and all sound notions of political democracy. He will achieve a uniformity of law and custom that will be undesirable on the merits and achieved despotically. How would you respond on behalf of Lincoln?
3. Worse, since the slave states cannot be expected to alter at his will, since his despotism will be resisted, his apparently harmless ideal 'invites a war of the North against the South.' How would you answer on behalf of Lincoln?
4. The choice is between Lincoln, who will destroy the Union in a war, or maintain it by despotism; and Douglas, who proposes keeping the Union by 'maintaining inviolate the Constitution of the United States as our fathers have made it.' How would you respond on behalf of Lincoln?
5. Lincoln's proposed 'resistance' to the decision of the Supreme Court is either a deliberate invitation to lawlessness or a promise of corruption. How would you respond on behalf of Lincoln?
6. Behind the idealistic words of the 'sincere' and 'conscientious' Lincoln is a revolutionary who promises to involve the entire nation in war and bring the government into total ruin. How would you respond on behalf of Lincoln?
7. Lincoln's view that the clause 'all men are created equal' was meant to refer to members of 'inferior races' is historically absurd – since all states were at the time slave states – and is a radical statement of general equality between white and black. 'He finds the Negro is his brother. I do not think that the Negro is any kin of mine at all.' Lincoln's view leads to black votes, black governors, interracial marriages, to a social union of the races. How would you respond on behalf of Lincoln?
8. What else does Douglas say that the issue that divides them involves? What else does he put at stake here? How would you answer him on those points? It would be remarkably

³⁶ *The Legal Imagination* 840.

instructive for you to draft a complete, argumentative answer. Then look at Lincoln's speech in response, given the same day. It is important, in drafting a response, to write as if you were a person seeking to become senator from Illinois in 1858. There is no difficulty in scribbling down self-righteously the language of equality which, thanks in no small measure to Lincoln's responses to Douglas, is widely accepted today – so widely accepted, in fact, that it is a cliché, a dead language. What was the world like when that language was being made?

It will require the greatest exercise of the imagination to put yourself in such a world. I think you will probably agree that one who said at that time what you now believe and feel on the subject of slavery and racial equality could not have hoped to be elected senator from Illinois or president of the United States. What would a decent person say who did hope to be elected? Your feelings may be such that such a compromise of principle for expediency is unthinkable; no concession could be made for a moment to the institution of slavery, and nothing said on the subject except that it should be abolished instantly at absolutely any cost.

It is easy to assume the position of moral superiority that such feelings imply, because the battle against the law of slavery (if not against its consequences) has been won. But let me ask you this: do you favor immediate, unilateral destruction of the government of the Union of South Africa by American arms? Why not? Is your position that although you consider her policy heinous, she is a distinct state with power over her own affairs, with which America has not the right to interfere? Or that the cure would be at least as bad as the disease? Or that there are better ways to correct the situation? Who would have talked that way at the time of Lincoln? Whatever your private views, what would you say if you were now running for the United States Senate: would you demand the end of South African apartheid instantly and at any price? Would you have any chance at election?³⁷

This set of questions has captured my attention time and time again for a variety of different reasons, some of which are as follows.

One question that I have repeatedly gravitated toward is this one: 'What was the world like when [the language of equality] was being made?' That question places enormous demands on the imagination. As White immediately goes on to say: 'It will require the greatest exercise of the imagination to put yourself in such a world.' We might put it this way: to put yourself in their world is to undergo an alienation from

commonplaces by which you have organized your life (*Alienation). How might White's reader be helped along with the alienation? It would seem that a striking analogy (*Analogy), wrapped up in a striking question (*Questioning), is the way to go: 'But let me ask you this: do you favor immediate, unilateral destruction of the government of the Union of South Africa by American arms?' If that imaginative question was not enough, there is another to follow: 'Whatever your private views, what would you say if you were now running for the United States Senate: would you demand the end of South African apartheid instantly and at any price?' For us, White's exercise of his analogical imagination can itself offer a powerfully instructive experience. What if White's reader cannot catch his drift? What if she is about to close *The Legal Imagination* for the first and the last time, unable to make sense of what all this questioning is about? What if she could not begin to understand why anyone would spend several years of his life writing about the activity of learning to read James Boyd White? We might, in a last ditch effort to start a conversation, echo White and say something like this: It will require the greatest exercise of the imagination to put yourself in the world that White creates. This is a world in which the apartheid atrocities that were carried out in the name of the law can readily be repeated, and repeated by otherwise decent people, if they do not make a point of exercising their imaginations in the way White calls out for. The injustices of the apartheid regime, as with the injustice of slavery in America, were at their root failures of the imagination. If we fail to imagine such injustices as failures of the imagination, we may well be destined to repeat dehumanizing histories. How should we imagine the imagination? What place would that White-inspired question have in legal education under the apartheid regime? Why no place? What would government officials in the apartheid regime have to fear about with such a question?

White's exercise of his analogical imagination in the direction of the apartheid regime, by my reading, is an excellent way of helping his reader tune in to the significantly different culture that Lincoln and Douglas inhabit. With the unshared experience of living with slavery, it would be easy to do an injustice to Douglas with 'a cliché, a dead language.' White's comparison offers his reader something of a shared

³⁷ Ibid 840-42 (the numbering of the questions does not follow the original).

experience. In the act of making the comparison, the metaphor, White offers his reader a resource for an 'exercise of imagination'.

The fifth question, inviting a response on behalf of Lincoln regarding his 'proposed "resistance" to the . . . Supreme Court', is one I took up. Douglas said this:

I say to you, fellow citizens, that I have no warfare to make upon the Supreme Court because of the Dredd Scott decision. My private opinions on some points of the case may have been one way; and on other points of the case another; in some things concurring with the Court, and in other dissenting; but what have my private opinions in a question of law to do with the decision after it has been pronounced by the highest judicial tribunal known to the Constitution? You, sir [addressing the chairman], as an eminent lawyer, have aright to entertain your own opinions on any question that comes before the court, and to appear before the tribunal and maintain them boldly and with tenacity until the final decision shall have been pronounced; and then, sir, whether you are sustained or overruled, your duty as a lawyer and as a citizen is to bow in deference to that decision. I intend to yield obedience to the decision of the highest tribunal in the land in all cases, whether their opinions are in conformity with my views as a lawyer or not. When we refuse to abide by judicial decisions, what protection is there for life and property? To whom shall you appeal? To mob law, to partisan caucuses, to town meetings, to revolution? Where is the remedy when you refuse obedience to the constituted authorities? I will not stop to inquire whether I agree or disagree with all the opinions expressed by Judge Taney or any other judge. It is enough for me to know that the decision has been made. It has been made by a tribunal appointed by the Constitution to make it; it was a point within their jurisdiction, and I am bound by it.

But, my friends, Mr. Lincoln says that the Dredd Scott decision destroys the doctrine of popular sovereignty, for the reason that the Court has decided that Congress had no power to prohibit slavery in the Territories, and hence he infers that it would decide that the Territorial legislatures could not prohibit slavery there. I will not stop to inquire whether the Court will carry the decision that far or not. It would be interesting as a matter of theory, but of no importance in practice; for this reason, that if the people of a Territory want slavery they will have it, and if they do not want it they will drive it out, and you cannot force it on them.³⁸

A draft response is offered below in italics.

³⁸ Quoted in *The Legal Imagination* 832-33.

In response, I say to you, fellow citizens, that we should not 'bow in deference to that decision', at least not blindly. We should 'bow in deference' to a decision if it is worthy of respect. In the matter of what is to count as law, it should never be 'enough for me to know that the decision has been made.' There have been many times when my private opinions have been at odds with Supreme Court decisions. Nonetheless, the decisions have been well-reasoned, certainly not deserving of public criticism, especially with an intention to overrule. The Dredd Scott case is not just another case, not the least because Justice Taney's judgment for the Court is not worthy of the word 'judgment'. The so-called judgment reads to me as a pre-judgment, which begins and ends with Dredd Scott not as a potential neighbour but as an object, a piece of property. Many more free Negroes must now be very anxious about becoming the same, an equal with him and an unequal with all others. Does our Constitution invite us to aspire to create such inequality?

I have no desire to annihilate State sovereignty. Each State is sovereign in its respective sphere. But it should be clear that that sovereignty is not an unlimited power to do anything. The limits of this power are not in black and white for all to see. We have to work out these limits. The word 'sovereignty' can readily hinder our talk about what needs to be worked out. The composers of our Constitution saw fit to avoid the word, and we might do well to follow them. Mr. Douglas's principle is to recognize each State of the Union as 'sovereign', and 'equal' in its 'sovereignty'. His principle is an admirable one, which may be reconcilable with the principle of 'popular sovereignty'. This may make anxious those who aspire to have Negroes as protected property for ever. Such people may seek comfort in the fact that the Constitution did not put that aspiration in stone. Of course we must respect the legitimate rights of slave owners, but we must also respect a just process for working out what is 'legitimate'.

When we were about to declare our independence from Great Britain and form the United States of America, the great statesman Edmund Burke, who sympathized with us, tried to reason with King George III and with his fellow citizens. For his King, Sovereignty meant Sovereignty, nothing else. His King's position was, however, too simple for serious thought. On the matter of 'the parliament of Great Britain' being 'the sovereign of America', he said: 'That the sovereignty was not in its nature an abstract idea of unity, but was capable of great complexity and infinite modifications, according to the temper of those who are to be governed, and to the circumstances of things; which being infinitely diversified, government ought to be adapted to them'. Those words could have prevented much needless bloodshed,

but the King had stopped his ears. In light of the Dredd Scott decision, we now need more complexity in our talk about sovereignty (and its companion 'property') within the United States, and we may hope that Mr. Douglas has not stopped his ears.

The poorly reasoned Dredd Scott decision has undermined the prestige of the Supreme Court at the time when the moral guidance of a respected national Court is so needed. I hope you will join me in resisting the authority of the Court in this particular case in the name of law and justice.

That is an early draft, and I intend to come back to it with a view to revising it and revising it again and again. I want only to say here that the experience of trying to engage with Douglas was somewhat disturbing. I found myself accepting some of his arguments, and in so doing I was accepting the claim that slave holders had legitimate rights. In coming to accept the claim, I would say that I experienced a conversion, by which I mean a significant shift in my image of the world.

In 'trying to engage with Douglas' we might say we are trying to have a 'conversation'. Conversation, then, can be full of dangers. Conversion and conversation may be said to be part of the same activity. How do we know when to stay out of a conversation, lest we be converted to a repulsive and immoral force, such as certain versions of economics?

Soon after the set of questions reproduced above on Lincoln and Douglas, White offers some remarks that direct his reader to the mystery of 'legal' argument:

In the Lincoln-Douglas arguments, one side answers another, and is answered itself. The listener or reader asks, at the end of one statement, 'How on earth can the other man respond?' yet when the answer comes, he feels that it is complete and carries the day – only to have his mind changed again. Only the most painful thought can enable the reader to resist such pressures and define his own position. The literary question is, 'What can he say now?' and the literary experience is surprise and wonder at what he does say. I mean by this to lead you to recognize your feelings at the end of Douglas's speech: do you not ask yourself 'What can Lincoln possibly say now?' and at the same time expect that his response will satisfy you?³⁹

³⁹ Ibid 842.

Carried over into the context of the legal hearing, that passage offers to deeply unsettle the distinction between 'the literary' and 'the legal'. The passage certainly serves as elaboration on White's image of the law *as* a literary activity. What can doubters such as Richard Posner say now?

Would we expect Posner's response to satisfy us? If so, might it be that we haven't really 'read' White? Perhaps we haven't become a 'convert', at least for a moment?

* * *

No doubt there are many legal academics who could be identified as eiconists. However, few could be reasonably compared with White for capturing Boulding's integrative spirit. After reading White, we may come to consider the absence of a chapter in *The Image* about 'the image' in the life of the law to be a striking and unfortunate omission. If anyone felt inclined to try and get a new edition of *The Image* published, they would do well to make some connections between Boulding's work and White's. If I was pressured into selecting one passage from White's work for the purpose of making connections, it would be from penultimate chapter of *When Words Lose Their Meaning*, where White presents this image of the law:

The law . . . provides a place that is at once part of the larger culture and apart from it, a place in which we can think about a problematic story by retelling it in various ways and can ask in a new and self-conscious way what it is to mean. Law works by a process of argument that places one version of events against another and creates a tension between them . . . ; in doing so it makes our choice of language conscious rather than habitual and creates a moment at which controlled change of language and culture becomes possible. The rhetorical structure of the law makes a place for each party and defines a relation between them by establishing the ways they may talk; in doing this it suggests a conception of justice as equality, for a person may find himself in any of these roles. The method of criticism most appropriate to the law as such is concerned less with the wisdom of a particular policy choice or the rightness of a particular rule or result than with the character that a court, legislature, or other legal speaker gives himself and his institution, the place it defines for others, and the relation it establishes between them. The law is less a branch of the social sciences than of the humanities in that it seeks not to be a closed system but an open one. It learns from the past and seeks new terms for the expression of motives, new forms for the establishment of relations; it is a method of learning and teaching; and its central concern is

with the kind of relations that we establish with our inherited culture and with each other when we speak its language.

To conceive of the law as a rhetorical and social system, a way in which we use an inherited language to talk to each other and to maintain a community, suggests in a new way that the heart of law is what we always knew it was: the open hearing in which one point of view, one construction of language and reality, is tested against another. The multiplicity of readings that the law permits is not its weakness but its strength, for it is this that makes room for different voices and gives a purchase by which the culture may be modified in response to the demands of circumstance. It is a method at once for recognizing others, for acknowledging ignorance, and for achieving cultural change.⁴⁰

The law, we might say in the echo of Boulding's *The Image*, provides a place in which two or more rival images of certain events in our culture can be placed against each other. In doing so, it makes our construction and reconstruction of images conscious and creates a moment at which controlled change of images and culture becomes possible. In this regard, the law lends itself as an example for other discourses, such as economics, for the management of its own cultural change, which takes place with the continuous construction of new images. The principal art of life will then become that of ascertaining and regulating the ways in which our images of images control us, so that we may sense what they leave out, in the pursuit of acting justly.

* * *

White's engagement, in *Justice as Translation*, with 'the language of economics' seems to me to be continuous with Boulding's invitation to economists to become eiconists. Consider, for example, what White says in the following passage in which he offers general remarks about the 'pressures' of 'all languages':

What can I mean by the 'pressures' of a particular form of speech, or its 'moving us' in certain directions? As an example let us consider the language and culture of contemporary economics. Of course economics is a useful, legitimate, and interesting field of inquiry, but it is also a culture, and a culture shaped in part by the implications of its intellectual and verbal habits. Suppose you decide to study the way wealth is created by exchanges, and for purposes of analysis you posited a set of actors, of equal age and competence, each with

some control over the material of the universe – called resources – and you assumed as a psychological principle an unlimited acquisitiveness on the part of each, and therefore, with respect to resources, a severe structural scarcity. Suppose further you assumed that each agent was interested in its own welfare only, and thus perceived itself to be in permanent competition with all other agents (except those whom it chose to make the object of what economists call altruism). Next you assumed a medium in which surplus could be accumulated without limit. Then you began to see what flowed from these assumptions and tried to analyze real world events in these terms.

If you did this you would find yourself caught in a game, perhaps a fascinating game, testing your capacity to draw certain kinds of logical conclusions from the premises stated, a game with a force and life of its own. You would become a player, an economist; you would inhabit a world with its own values, its own realities, its own rewards. From such simplicity, such complexity! And such fun, too, though for me rather of an empty kind (at least until an attempt was made to connect the economic language and its culture to others). For good or ill, the language and its practices would gradually start to shape the way you saw the world and felt about it, your sense of yourself and of others. You might find yourself, for example, thinking and talking as if people really were the objects or calculating machines that economics assumes them to be; you might even find yourself accepting 'GNP' as a measure of a nation's economics health.

. . . [D]espite its claims to be merely hypothetical, economic theory becomes a culture of its own and can be studied and judged as such. My present point is not to criticize economics . . . but to suggest how habits of thought and language have tendencies, pressures of their own, that can perhaps be checked or controlled, but ought certainly to be reckoned with: how language has real power over the mind that uses it, even the mind that contributes to its reformulation. The cultural implications of one's language can be addressed, perhaps overcome; but the tendencies are there, and have a force of their own.⁴¹

Many if not most economists either dismiss, devalue, or ignore talk about 'culture' and 'habits'. These economists image language as merely a transparent tool for mechanistically pointing to objects in the world. Following from this, they eliminate from their attention large dimensions of human knowing that center on experiencing and understanding and judging. They eliminate questions such as: What does this game feel like? Is it a worthy game for me and for others? In doing so, no invitation is

⁴⁰ *When Words Lose Their Meaning* 273 (footnote omitted).

⁴¹ *Justice as Translation* 27-28.

made to become an attentive to one's experience, an intelligent reader of one's experience, and a sound judge. One may become a character resembling a cyborg, made in the dominant mechanistic image of *Homo economicus*.

If economists come to accept White's claim about economics as a language/culture, then they would significantly change the way they talk.⁴² White suggests as much:

The economist, as insider, has to ask himself how this language, to which he is deeply committed, can and should be integrated with other languages, what other aspects of the culture should be mobilized and kept alive in his mind and talk, and whether, in consequence, the language of economics should itself be transformed. For us as comparative outsiders the question is both harder and simpler: harder because we know less about the language, but also simpler, for we are less committed to it.⁴³

Sensitivity to the political and ethical significance of the discourse and to its intellectual limitations, if it is real, will show up not merely in appendices or prolegomena but also in one's actual writing and talking. This means that the discourse itself will inevitably undergo transformation of kinds now impossible to foresee. Not only, then, are those of us who stand in the general culture wise ourselves to resist the imperialism of economics; we can properly insist as well that in speaking to us the economist integrate what he knows as an economist with what he knows in the rest of life and reflect this knowledge in the way he talks about the nature of our community and its future. I am not trying to suggest that economists should stop their trade but that they should be something else as well, rhetorical and cultural critics of their own discourse. When they are that, I believe they will find that their discourse itself will have to be transformed.⁴⁴

Many economists might find it difficult to imagine deciding to become 'rhetorical and cultural critics of their own discourse'. They may well laugh at the invitation. If so, they might do well to learn or remember that an attempt by Gary Becker, in the late 1950s, to pioneer the use of 'rational actor analysis' to explain 'nonmarket' behaviour was met with laughter.⁴⁵ The laughter then and now might stir economists now or in

⁴² See R Dawson, 'Judging Economics Teaching and Textbooks' (2007) 60 *Journal of Australian Political Economy* 73.

⁴³ *Justice as Translation* 76.

⁴⁴ *Ibid* 77.

⁴⁵ See J Carbone, 'What Do Women Really Want?: Economics, Justice, and the Market for Intimate Relationships' in M A Fineman and T Dougherty (eds), *Feminism Confronts Homo Economicus: Gender, Law, and Society* (2005) 405, 406.

the future into developing a really adequate theory of behaviour. (How does an activity that seems at first absurd end up becoming normal or respectable, even revered?) For such a theory, I suggest that Boulding's *The Image* as a great place to begin. The name 'eiconists' might be much more appealing to economists than 'rhetorical and cultural critics'. For an eiconist by any another name would not have a 'scientific' ring to it.

* * *

One feature of White's work to which I am particularly attracted is its self-referentiability, to use a term that has applied to Boulding's theory of the image.⁴⁶ (The term 'self-reflexivity' is a suitable alternative.) This feature is notably absent from the work of economic imperialists, who generally fail to direct their theories to themselves. White suggests as much:

Whatever its merits, the language and practice of economics cannot be justified in its own terms. . . . When the economist speaks to us, he is acting not as an economic actor himself, engaging in arms-length exchanges designed to increase his utility, but as one mind speaking to another, seeking to persuade to particular conclusions, to a language, to a view of life. He speaks as a person asking to be believed. He is engaged, that is, in the rhetorical and communal practices of conversation in which he asks to be listened to as one who seeks the truth, and these are activities for the description and criticism of which his own language as an economist is wholly inadequate.⁴⁷

The economist who promotes a certain image of *Homo economicus* will do well to attend to the limits of the image, especially as it concerns the place of the economist in it. In attending to these limits, the economist may feel inclined to modify the image so that she can have a meaningful place in it. Such an economist will then be taking self-referentiability seriously.

In *Another Version of 'Sweetness and Light'* (1992), Susan Heinzelman criticized White's *Justice as Translation* for its 'failure of self-reflexivity'. A fragment of her review essay is as follows:

⁴⁶ W J Samuels, 'Kenneth Boulding's *The Image* and Contemporary Discourse Analysis' in W J Samuels et alia (eds) *The Economy as a Process of Valuation* (2002) 299, 306.

⁴⁷ *Justice as Translation* 79.

When James Boyd White describes the practice of cultural criticism as a conversation with texts, he also provides an apt account of the reviewer's task. She must judge the text under review in terms of its contribution to contemporary critical conversations, situating both text and context in relation to the past. . . .

. . . What kind of conversation does the textual persona offer us? . . . Certain adjectives quickly come to mind—thoughtful, urbane, compassionate, moderate. It is the kind of conversation that one might imagine having with a friend—a time of tentative questioning, of unthreatening inquiry. White specifically invites us to accept him on those terms, preempting our objections to his assertions by acknowledging that he is not an expert on, say, economics but that he speaks 'simply as a local informant about [his] own language, without any claims to knowledge beyond those of [his] reader, whose language it is also. . . .

White is not unaware of the contradictions he creates in proposing a theory that critiques propositional language: 'I write and speak against the very force of the language I am using, against the occasion of my writing, against the expectations that bring us for this moment together' (at 231). However, such disclaimers and appeals to listen to 'the music the voices make' do not absolve him from confronting this central contradiction in his text. This failure to challenge his own terms adequately, to engage in the kind of self-reflexive and self-conscious critical practice he advocates for the rest of us, eventually undermines his own project and unfortunately compromises the ethical position he assumes.

It is also to this failure of self-reflexivity that I would assign another pervasive problem with the persona White adopts. One of the oft-repeated terms of his discourse is 'conversation,' by which he means entering into dialogue with the plurality of voices that constitute our contemporary community. When we 'look to the texts, to the modes of discourse, we inhabit and create, . . . [w]hat voices do we hear, and find ourselves using? What kinds of conversations make up our world?' (at 8). Given the insistence on listening to others, on paying attention to the multiple narratives and voices that create what we call our cultural conversation, it is remarkable that White seems to hear so few speakers.

What I find missing from White's text is all reference to those who have created the discourse he finds so appropriate to his argument. When White dismisses academic and professional discourse as inauthentic, abstract, and jargon-ridden, he obscures the source of his own discourse. Talk of many-voicedness, of respect for the Other, of the plurality of voices, of personal and urgent narratives, of identity born out of difference was not generated, despite the impression that White gives, only out of the idiosyncrasies of his professional career in which, fortuitously, he was able to compare the discourse of the law with the discourse of literature and to reflect on their differences and similarities. The

central critical terms of his text, familiar enough to certain kinds of cultural critics, are drawn from exactly those discourse that White attacks as obscurantist or seems to ignore—from poststructuralism, from deconstruction, from feminism, from critical legal studies, and critical race studies. I realize that White has long discussed these topics in language like that he adopts here. But that certain essays in the book predate the general acceptance of poststructuralist or feminist theory does not excuse his ignoring of the contemporary context and its theoretical language. After all, the place of language and language use in culture is precisely the point of his argument.

...

White's ... assumption that one cannot find a voice that compels 'attention by its authenticity, its urgency, its presence, and invites a similar response from another' (at 10) would come under severe pressure if he reflected on where his own critical voice comes from. Personally, I don't have any trouble finding those authentic and urgent voices. Perhaps he could read, for example, Regina Austin, bell hooks, Catharine MacKinnon, Mari Matsuda, Martha Minow, Judy Scales-Trent, Joan Scott, Elizabeth Schneider, Hortense Spillers, Robin West, Joan Williams, or Patricia Williams; subscribe to *Signs*, *Feminist Issues*, *Genders*, or *Sage*; read the *Harvard's Women's Law Journal*, the *Berkeley Women's Law Journal*, the *Texas Journal of Women and the Law*, or the *Yale Journal of Law and Feminism*. One of the pervasive problems, then, that I have with White's text is that the community he claims he wishes to bring into being—that community of mutual respect and authenticity—seems, on closer examination, remarkably like earlier discursive communities from which those to whom he would now offer respect and recognition have been excluded.

I hesitate to call White's version of a conversation monologic, but doing so seems kinder than accusing him of intellectual duplicity, although he does not hesitate to accuse his colleagues of exactly that: 'Suppose our references were not to the literature we are supposed to have read but to the texts we actually have read, and thought about, and wish to respond to: How different would our writing be, in voice and sense of audience, in shape and tone?' (At 11) What kind of intellectual insincerity and dishonesty does White imagine 'us' to be guilty of: who is this 'we' of which he speaks?⁴⁸

Who is this person speaking? What is her tone? What relation does she express between her 'I' and her reader?

⁴⁸ S S Heinzelman, 'Another Version of 'Sweetness and Light': White on Cultural and Legal Criticism' (1992) 17 *Law & Social Inquiry* 259, 259, 264-68.

First, is Heinzelman a good listener? When did White ever say or suggest that he engages in the activity of 'proposing a theory that critiques propositional language'? White in fact explicitly says that he is writing against 'theory',⁴⁹ at least theory that we might call 'non-self-reflexive', which is monophonic. Heinzelman would have done well to identify White's relationship with theory, not the least for the purpose of trying to identify the 'conversation' to which he seeks to place himself in and transform.

What does White mean in his use of the word 'conversation'? Heinzelman's answer is this: 'entering into dialogue with the plurality of voices that constitute our contemporary community.' She may have done well to offer not only some remarks about the words 'dialogue' and 'plurality' but also some alternative definitions that are congruent with several of White's uses of 'conversation'. She may have also done well to direct attention to the *limits* of 'definitions'. In directing attention to multiple definitions and to their respective limits in our talk about 'conversation', Heinzelman arguably would be providing a better conversational *performance*, not least through the exercise of a wider range of voices. Where are her voices of doubt in regard to her ability to hear White's voices and to justly place the conversation that he seeks to define and celebrate?

'What I find missing in White's text', Heinzelman says, 'is all reference to those who have created the discourse he finds so appropriate to his argument.' Her reference to 'the discourse' seems to me to be clumsy, for there are *many* discourses, each of which is making distinctive arguments. What is White's 'argument'? She might have done to explicitly identify her *image* of White's 'argument' and to direct attention to the limits of her image, not least to encourage her reader to do the same in relation to White's *Justice as Translation* and to her review essay. Her White can never be exactly the same as your White. She would have done well to draw attention to this unavoidable gap, not least to make a space for 'conversation' about it.

'The central critical terms' of White's text are arguably 'drawn' *not* 'from exactly those discourses that White attacks as obscurantist or seems to ignore' but from ordinary language and ordinary life. Heinzelman suggests as much when she responds to her own question, 'What kind of conversation does the textual persona offer us?': 'Certain adjectives quickly come to mind—thoughtful, urbane,

⁴⁹ *Justice as Translation* 26.

compassionate, moderate. It is the kind of conversation that one might imagine having with a friend—a time of tentative questioning, of unthreatening inquiry.’ I agree wholeheartedly. When I first started reading White, I was struck by the manner of his talk: reading *Justice as Translation* resembled a good, sincere conversation with a close friend. I wanted to keep reading, not least for the strikingly extraordinary questions about ordinary life. Personally, I have trouble finding a close resemblance to White’s multi-vocal *and invitational* way of talking. I’ve read Regina Austin, bell hooks, among others listed, but not one of them captures my attention like White’s writing. For me, the profusion of sincere and inviting questions is what differentiates my image of White’s work from my image of Austin et alia.

Imagination

In *Judging the Judges, Judging Ourselves* (1998), a critique of the Truth and Reconciliation Commission's Legal Community Hearings, David Dyzenhaus has much to suggest about the importance of attending to the imagination. For example, drawing from the language of Robert Cover, who is known for 'his brilliance in pursuit of the complexities of moral choice',¹ Dyzenhaus has this to say about the performances of two members of the apartheid judiciary:

Perhaps even more telling than Leon's failure of moral imagination—his failure to connect 'violence and the word'—is his failure of political imagination.²

The way that Corbett chose to tell Zondo's story—from one side of South Africa's divide—and claim that Leon 'had no choice'—an attempt to disempower the court—convicts him too of a failure of both moral and political imagination. It was true that a judge, as Corbett said, had 'no choice' but to impose the death penalty if no extenuating circumstances were to be found. But there is the fact that not only did some judges always find extenuating circumstances, but that Zondo's age and political circumstances of the case made such a finding relatively easy, if a judge could resist being swayed by the sentiments of white South Africans.³

That which Dyzenhaus calls 'failure of moral imagination', along with that which he calls 'failure of political imagination', is a vital part of that which he defines elsewhere in his book as 'legal'.⁴ How, we might ask, does Dyzenhaus imagine the 'legal'? Let us come back to that question later in this entry. In the meantime, let us try to equip ourselves for responding to it. We begin by engaging with White's 'thesis' in *The Legal Imagination* – to recall: 'that the activities which make up the professional lawyer and

¹ A Soifer, 'Reviewing Legal Fictions' (1986) 20 *Georgia Law Review* 871, 872.

² D Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998) 48-9 (footnote to Cover omitted).

³ Ibid 49.

⁴ Ibid, 57, 130, 135.

judge constitute an enterprise of the imagination, an enterprise whose central performance is the claim of meaning against the odds: the translation of the imagination into reality by the power of language.'

* * *

Immediately after stating his 'thesis', White offers several pages of explicit elaboration. He begins as follows:

Its art is accordingly a literary one, most obviously perhaps in the demand that one master the forces and limits of what we have called the legal language system – speaking, as it does, in a set of official voices, reducing people to institutional identities, insisting on the repetition of inherited patterns of thought and speech (most frustratingly in its use of the rule) and reposing an impossible confidence in its fictional pretenses. The art of the lawyer is perhaps first of all the literary art that controls this language. To say as much, and to ask how that language is to be controlled – what the lawyer can do with it – is to say that the lawyer is at heart a writer, one who lives by the power of his imagination. This is not a usual cultural definition of the law – which is often regarded as a subject, not an activity, let alone as an imaginative and literary one – but it is one for which you have been prepared by work you have done in this course.⁵

If one fails to 'master the forces and limits of . . . the legal language system', one may delusively imagine the law not as an activity (*Activity) but as an object, in the form of a system of rules. White invites his reader to direct her attention toward 'the literary art that controls' dehumanizing 'official voices' associated with 'the legal language system'. Had the lawyer and revolutionary Bram Fischer read this passage before he died in jail in 1975 we can be confident that he would have wanted to read more, if only for an expression of a way of imagining the law that fitted with his experience. (In the early 1960s, Fischer censured various members of the apartheid judiciary for what White calls 'reducing people to institutional identities'.⁶) Whilst the claim that 'the lawyer is at heart a writer' perhaps would not have surprised him, a near 1000-page sustained expression of it surely would have done so.

⁵ *The Legal Imagination* 758.

⁶ For a comprehensive discussion of Fischer's resistance to the apartheid judiciary, see S Clingman, *Bram Fischer: Afrikaner Revolutionary* (1998).

In continuing with his elaboration, White suggests more about the lawyer's relationship with language:

The demands on your imagination start outside the legal language system, perhaps outside all language, when you first face a client or a judge or a juror and ask yourself 'Who is this person?' in a way that recognizes that he may be different from you. What is called for here is a social and narrative imagination, a capacity to envision different versions of the future. . . . 'Who is this person, and how shall I address him?' is a constant question in the life of the lawyer, and you will not think it a simple one. The imagination here is a faculty of sympathy as well as intellect. Or suppose you are arguing a case: you must imagine ahead of time what the judge might say to this or that, or what the other lawyer might say in objection to the evidence or in refutation of your position, and prepare to meet it. 'If I say this, he may say that; and then I . . . ' To argue well, you must imagine another mind and have some sense of how someone else might look at your client and his case. How can you put your case in his terms or get him to see it in yours? Likewise, as a legislator or rule maker, the heart of your task is making a just assessment of what your audience, your judges and lawyers, are likely to do with what you have written.⁷

Who is this author of *The Legal Imagination*, and how shall I address him? Who is my reader, and how shall I address her in the present engagement with White? What might the examiner of this Thesis say to this or that claim about White? Am I making 'a just assessment of what [my] audience . . . are likely to do with what [I] have written'? For White, in the law every speaker is particularly located. There is no neutral, unbiased, Archimedean view of the law. He suggests that doing justice to the experience of another requires training the imagination to go visiting one 'position' and then another and then another and back again. The line between 'I' and 'you', between speaker and audience, becomes somewhat indistinct. Language, legal and non-legal alike, is a medium with which an 'I' and 'you' not merely convey information but constitute a relation between each other. Is this relation a worthy one? How are we to judge?

As part his elaboration, White talks about the ordinary (yet neglected) activity of reading. Here is one fragment:

[A]s you learned in the first year of law school, it is not enough to follow the directions of the Speed-Reading Institute and read a case of the main idea; one must read with a literary or archeological imagination, reconstructing the facts, the trial, the argument, asking how a prior case might have been better used, what issues seem omitted or miscast, exactly why things were put just this way or that, and how it all might have been better done. One must engage in a similar process as the auditor of the client's story and as the reader of documents he provides as a record of his past. The lawyer's imagination, that is, must work in the past as well as the future. 'If I had been there . . .'⁸

How is this passage on the activity of reading to be read? How are we to 'engage' with it? The word 'process' can be taken to be a key one not only in the passage but in the book. The process of reading involves the necessity of making judgments in an explorative and open-ended activity. White has sometimes said that *The Legal Imagination* is written for 'a course in reading and writing, a study of what lawyers and judges do with words.'⁹ He is, however, quick to qualify this description, for his sense of 'reading and writing' departs significantly from the familiar. The word 'reading' is commonly used today to suggest a passive taking in of a text. According to the *Oxford English Dictionary*, the word originally implied a more active process: 'The original senses of the Teut. verb are those of taking or giving counsel, taking care or charge of a thing, having or exercising control over something, etc.'¹⁰ The kind of reading White is principally concerned with fits with the older usage.

The imagination of the lawyer is 'also a power that organizes what is seen and claims meaning for it'.¹¹ White continues:

The lawyer must constantly be ready to express things in an original way, to make an imaginatively organized statement, to speak in a way that meets the occasion and says what it calls for. When he rises in the courtroom to make a closing statement to the jury or to argue on appeal, or when he speaks in a letter or orally to his client, the demand is a literary one: he must organize what he knows about the case, the individuals and the law, and do so not only for himself but for others, in such a way that his statement, his version of things, can

⁷ *The Legal Imagination* 758-9 (footnote omitted).

⁸ *Ibid* 759.

⁹ *Ibid* xxxi.

¹⁰ *The Oxford English Dictionary* (1989, 2nd ed), prepared by J A Simpson and E S C Weiner.

¹¹ *The Legal Imagination* 759.

stand the test of comparison with another version, so that it will be taken as the right one. What can he lead his audience to accept and tolerate? What order can be put upon things?¹²

Those questions can serve to remind us of White's claim that law can be imagined as a branch of rhetoric, in the sense of the art by which community and culture are established and transformed (*Rhetoric). The image of the law as a system of rules can direct attention away from the reality that lawyers argue from circumstance. Each 'case arising' is different in some way from all others. But similarities must be constructed so as to speak in general terms and thus to begin 'law' talk. Each party will propose an 'order' as to the way things are and ought to be. The concern with 'order' is the concern with managing tension between the need for both continuity and change in a world of flux. A critical question includes: Order on whose terms? Whatever social 'order' emerges is a fragile creation of the imagination. This order is not found 'out there' but is made and remade from the inside and the outside; it is in a continual process of becoming.

Yet another way in which the activities of the lawyer's life are imaginative is this: 'they include a process of self-imagination.' White specifies with these words:

For as you work through your life as a lawyer, struggling to put things the right way, to make and defend your claims of meaning – as you choose what to say and not say – you work out an identity for yourself, you define a mind and a character, very much as the historian or poet or novelist might be said to do. At the end of thirty years you will be able to look at shelves of briefs, think back on negotiations and arguments and interviews, and say, 'Here is what I have found it possible to say.'¹³

As his reader works through *The Legal Imagination*, struggling to respond the right way, she works out an identity for herself. She might do well to ask: What kind of person does White ask me to become? Does he invite me to reach for, say, the Bram Fischer within me? If so, is Bram Fischer the kind of person I want to become?

* * *

¹² Ibid.

¹³ Ibid 760.

The use of the word 'imagination' in *The Legal Imagination* may have an odd ring for some readers. 'The very title of the book', Jeanne Gaakeer remarks in *Hope Springs Eternal* (1998), 'must have been especially provoking at the start of the humanist renaissance in law because it functions as an oxymoron.'¹⁴ There is a long history of deprecating the imagination. For this, we need only turn to Shakespeare's *A Midsummer Night's Dream* (c 1595). Theseus has this to say to Hippolyta:

Lovers and madmen have such seething brains,
Such shaping fantasies that apprehend
More than cool reason comprehends.
The lunatic, the lover and the poet,
Are of imagination all compact.
One sees more devils that vast hell can hold;
That is the madman. The lover, all as frantic,
Sees Helen's beauty in a brow of Egypt.
The poet's eye, in a fine frenzy rolling,
Doth glance from heaven to earth, from earth to heaven,
And as imagination bodies forth
The forms of things unknown, the poet's pen
Turns them to shapes and gives to airy nothing
A local habitation and a name.¹⁵

The poet is said to give a 'local habitation and a name' to nothing. His creations, being the result of imagination, have no more connection with the real world than the delusions of the madman or the lover who is blind to the real nature of his beloved.

We can be sure that Theseus' placement of the imagination in opposition to reason is one that Shakespeare invites his audience to challenge. His *King Richard II*, to recall (*Attunement), offers much food-for-thought for a such a challenge. In *The Legal Imagination*, White directs attention to the play for the purpose of inquiring into the imaginative foundations of authority:

¹⁴ J Gaakeer, *Hope Springs Eternal: An Introduction to the Work of James Boyd White* (1998) 17.

¹⁵ W Shakespeare, *A Midsummer Night's Dream* (c 1595) in J Bate and E Rasmussen (ed), *William Shakespeare: Complete Works* (2007) 5.1.4-17.

It seems to be part of the notion of authority that it is unquestioned, an obvious fact, not a judgment: 'Not all the water in the rough rude sea / Can wash the balm from an anointed king,' says Shakespeare's Richard II, defining the attitude which regards what happens in that play – the deposition of a king – as unthinkable, impossible. . . . Does a lawyer ever have such authority? Can he somehow manufacture it for himself, or for his arguments?¹⁶

How is the authority of a proposition, a source, or a person to be established, and once established, how questioned? See M. Gilmore, *Argument From Roman Law in Political Thought: 1200-1600* (1941), which tells the story of the making of a language of authority. As you can imagine, when such a language is being made, everything is rethought at once; to question an old authority, an old system of reference and appeal, is to throw everything open. The essence of a language of authority is that it shall not be questioned but accepted as necessary; and, as Shakespeare's *Richard II* demonstrates, when such a language is taken as open to question, it loses its peculiar force at once.¹⁷

When 'a language . . . loses its peculiar force', its user will find that his way of imagining his world, and himself and others in it, collapses. The desire for some sort of coherence, as Shakespeare's imprisoned Richard II showed us, requires one to imaginatively create a new way of imagining the world.

The experience of a language collapsing is an experience that *The Legal Imagination* offers, as we have already heard (*Experience). Repetition here may be helpful. Speaking generally about his legal writing course, White says this:

You might sum up the experience this course offers by saying that it is an experience in the collapse of language under strain: the collapse not only of the legal language, but of the other languages you have used (or psychology, of race, of social organization, of explanation, of criticism, of paper-writing, and so on). You have experienced what could be called the central frustration of writer and lawyer, the perpetual breaking down of language in your hands as you try to use it. None of our languages seems to be able to do what it promises, none can bear the stresses of our demands for truth and order and justice. Such, it seems to me, are the conditions of our existence.¹⁸

¹⁶ *The Legal Imagination* 815.

¹⁷ *Ibid* 817.

¹⁸ *The Legal Imagination* 760.

Irrespective of the language one uses, when faced with 'the conditions of our existence', one can readily attend to the activity that is at the heart of White's work, namely transformative constitutionalism – constituting and reconstituting ourselves and our relations with others when we use, and in using transform, our language.

* * *

For me, reading, really reading, *The Legal Imagination* requires the reader to alienate her- or himself from habitual modes of thought and expression and to establish some new ones. For assistance with this enterprise of the imagination, we may benefit from a fragment of John Dewey's wide-ranging work.

In *Human Nature and Conduct* (1922), Dewey uses the word 'habit' in 'a somewhat broader sense than is usual', including not only the regular behavioural patterns of a person but also inherited institutions.¹⁹ Then and now, habit is commonly imagined as merely thoughtless repetition, which is opposed to 'reason'. Dewey invites the making of distinctions: 'the real opposition is not between reason and habit but between routine, unintelligent habit, and intelligent habit or art.'²⁰ He speaks of habits as having a complex role in human behaviour. Significantly, they *both* enable and restrict thought: 'Habits become negative limits because they are at first positive agencies.'²¹ Attention to habits can enable self-development: 'The more numerous our habits the wider the field of possible observation and foretelling.'²² Also, 'The more flexible they are, the more refined is perception in its discrimination and the more delicate the presentation evoked by imagination.'²³ Dewey claims that habits are integral to all intellectual activity. He says, for example, 'the formation of habits of belief, desire and judgment is going on at every instant under the influence of the conditions set by men's contact, intercourse and associations with one another.'²⁴ This claim does not sit well with those 'who think themselves scientifically emancipated and who ... perpetuate a ... notion of ... a separate knower.'²⁵ Such people could well be dissatisfied with a seemingly limited principal purpose of Dewey's work, namely to

¹⁹ J Dewey, *Human Nature and Conduct: An Introduction of Social Psychology* (1922) 40-41.

²⁰ Ibid 77.

²¹ Ibid 175.

²² Ibid.

²³ Ibid.

²⁴ Ibid 323.

²⁵ Ibid 176.

establish that human intelligence – conscious thought – can be used to turn ‘bad’ habits and customs into ‘better’ ones.

The process by which we turn bad habits and customs into better ones is principally an imaginative one. For Dewey:

[D]eliberation is a dramatic rehearsal (in imagination) of various competing possible lines of action. It starts from the blocking of efficient overt action, due to that conflict of prior habit and newly released impulse to which reference has been made. Then each habit, each impulse, involved in the temporary suspense of overt action takes its turn in being tried out. Deliberation is an experiment in finding out what the various lines of possible action are really like. It is an experiment in making various combinations of selected habits and impulses, to see what the resultant action would be like if it were entered upon. But the trial is in imagination, not in overt fact. The experiment is carried on by tentative rehearsals in thought which do not affect physical facts outside the body. Thought runs ahead and foresees outcomes, and thereby avoids having to wait the instruction of actual failure and disaster.²⁶

For Dewey, deliberative thought emerges through habits and is dependent upon them. He resists the simple opposition between ‘imagination’ and ‘deliberation’.

Drawing from William James, Dewey speaks of ‘experience’ as a ‘double-barrelled’ process, in which there is action ‘undergone’ and action ‘done’²⁷ – ‘undergoings’ and ‘doings’.²⁸ We are ‘doing’ when we organize our experience by employing already established modes of thought. We are ‘undergoing’ when our experiences breakdown these modes of thought. For Dewey, ‘[a]n experience has pattern and structure, because it is not just doing and undergoing in alternation, but consists of them in relationship.’²⁹ Giving some concrete to the abstract, he goes on to say:

To put one’s hand in the fire that consumes it is not necessarily to have an experience. The action and its consequence must be joined in perception. This relationship is what gives meaning; to grasp it is the objective of all intelligence. The scope and content of the relations measure the significant content of an experience. A child’s experience may be intense, but,

²⁶ Ibid 190.

²⁷ J Dewey, *Experience and Nature* (1925) 8.

²⁸ J Dewey, *Art as Experience* (1934) 23. See also his *Democracy and Education* (1916; 1966) 139.

²⁹ Ibid 44.

because of lack of background from past experience, relations between undergoing and doing are slightly grasped, and the experience does not have great depth or breadth.³⁰

An adult with rigid habits or with too few stable habits may lack the capacity to 'experience' in a manner that deserves the name.³¹

Achieving a productive combination of doing and undergoing is an art. For Dewey, what education should do is to enable people to develop firm habits that support flexible habits: 'What is necessary is that habits be formed which are more intelligent, more sensitively percipient, more informed with foresight, more aware of what they are about, more direct and sincere, more flexibly responsive than those now current.'³² This advice may can serve to remind us that '[t]here is no one ready-made self behind activities'³³ and that education involves 'an experiment in creating a self',³⁴ or rather a process should be about constituting and reconstituting the integration of selves.

For Dewey, life, especially life that involves complex organizational factors, is a continuing process of breakdown and reconstruction of habits.³⁵ If not managed well, breakdown can lead to fragmentation. If managed well, it can lead to a deeper maturity. A crucial role for education, for Dewey, is enhancing the capacity of people to manage change together, in the name of democracy.³⁶ It seems fair to say that White's *The Legal Imagination* is written out of a similar way of imagining education.

* * *

Dewey's work relating to the imaginative reconstitution of habit drew from the 'pragmatism' of Charles Sanders Peirce. In some 1903 lectures, Peirce, who sought to enrich talk about logic, not the least by transcending the dichotomy of induction and deduction, gave the name 'abduction' to a distinctive kind of reasoning.³⁷ The

³⁰ Ibid.

³¹ S M Fishman, 'Explicating Our Tacit Tradition: John Dewey and Composition Studies' (1993) 44 *College Composition and Communication* 315, 324-25.

³² Quoted in S Sullivan, 'Reconfiguring Gender with John Dewey: Habit, Bodies, and Cultural Change' (2000) 15 *Hypatia* 23, 34.

³³ *Human Nature and Conduct* 138.

³⁴ Ibid 139.

³⁵ T Koschmann, K Kuutti and L Hickman, 'The Concept of Breakdown in Heidegger, Leont'ev, and Dewey and Its Implications for Education' (1998) 5 *Mind, Culture, and Activity* 25, 32.

³⁶ Dewey's *Democracy and Education* has much to say and suggest about role of education in the service of democracy.

³⁷ C S Pierce, *Collected Papers of Charles Sanders Peirce* (eds C Hartshorne and P Weiss) (1934). Lecture VI is suggestively titled 'Three Types of Reasoning'. Lecture VII is titled 'Pragmatism and Abduction'. For a

induction-deduction dichotomy is commonly presented in terms of a directional metaphor: by induction one moves from particular to general and from the less general to the more general, ascending a theoretical ladder that ends in first principles; by deduction one moves from more general to less general and from general to particular, descending a theoretical ladder that ends in facts about particular individuals or events.³⁸ Peirce sensed that on their own neither induction nor deduction is capable of generating new ideas.³⁹ Peirce's 'abduction' is the act of making an imaginative leap from an unexplained data to a hypothesis. With little or nothing to go on, without even a very clear sense of the data about which she or he is hypothesizing, the thinker entertains a hypothesis that intuitively or instinctively seems right; it then remains to test that hypothesis inductively and to generalize from it deductively.⁴⁰ By 'abduction' Peirce meant a spark of creativity or intuition: 'The abductive suggestion comes to us like a flash. It is an act of insight, although extremely fallible insight.'⁴¹

The pioneering legal economist John Commons, whom we first met in our activity talk (*Activity), drew from Peirce's work in an effort to move beyond dichotomous thinking. Let us hear from his *Institutional Economics* (1934):

The meaning of Insight will appear if we examine the economists' controversy of fifty years ago over the 'deductive' and 'inductive' methods of investigation. The deductive method seems to be the method of the syllogism, with its major and minor premises from which flow an inevitable conclusion. Thus, man is mortal—the major premise; Socrates is a man—the minor premise; therefore Socrates is mortal—the inevitable conclusion. What we want to know, however, . . . is whether this particular Socrates now on the operating table will die and how soon, at the hands of the surgeon. Here we have a hundred major premises, some of which give us hope that he will live, others, fear that he will die. What we need here is insight.

So it is in economics. We are investigating the major premises themselves, and trying to discover whether, here and now, they can be controlled. The 'law of supply and demand,'

discussion of 'abduction', see C J Misak, *Truth and the End of Inquiry: A Peircean Account of Truth* (1991) 91-99. We can be sure that the Truth and Reconciliation Commission critic Dyzenhaus is intimately familiar with Peircean 'abduction', for Misak gets a special acknowledgment in his *Judging the Judges*. What might have become of the apartheid judiciary if they had taken 'abduction' seriously?

³⁸ This imagery draws from R L Gregory (ed), *The Oxford Companion to the Mind* (1987) 180.

³⁹ Peirce, op cit, 106. 'Abduction . . . is the only logical operation which introduces any new idea'.

⁴⁰ Here I draw from D Robinson, *Becoming a Translator: An Accelerated Course* (1997) 98-9.

⁴¹ Peirce, op cit, 106.

or, as we should say, the Principle of Scarcity, is inevitable, true enough, and, like death or the law of gravitation, cannot be avoided. . . . If a great corporation charges some of its customers a high price and their competitors a low price for the same commodity or service, were the high-price customers bankrupted by the 'law of supply and demand' or by an unfair use of the principle of Scarcity by the corporation? It is *insight* that we need.

Hence there are two meanings of the word 'induction' . . . Induction may be a collection of illustrations as minor premises, which, when assembled, merely restate the major premises. In which case we are reasoning in a circle. Or induction may be . . . a new Insight into the complexity of major and minor premises, all of which must be weighed and balanced for the particular situation and the consequences that have followed or may follow.

This kind of induction [could be called] . . . synthesis. Synthesis is not merely deduction or induction—it is insight into the relationship between the limiting and complementary parts of the whole situation in a world of change and perpetual discovery. It is Illumination, Understanding, and an Emotional Sense of the fitness of things. . . . The older controversies about deduction and induction disappear in the great movement to obtain Insight and Understanding. The process is never finished. There is plenty of room for more insight.⁴²

In a 'world of change and perpetual discovery', one can begin to self-consciously imagine a new sense of order and unity ('the fitness of things'), which is what Commons seeks to do in his engagement with the multiple approaches to economics, with an educated guess, the material of abduction.

The significant place of imagination in Commons' legal economics is evident in his *Legal Foundations of Capitalism* (1924). Commons urged the view that property rights are sets of relative capacities and constraints among people arising out of their relations to scarce things that they value in some way or another. These capacities and constraints, he claimed, are not and cannot be precisely defined at any given moment: 'the law' may be thought of as a fluid set of 'working rules,' loose *expectations* concerning what governmental officials will do if there is a conflict.⁴³ When a conflict does take place over relative rights, a court decides what the working rule *is*, a decision that may become a precedent and thereby re-shape expectations about what judicial officials will do if there is a similar conflict. For Commons, rights are ephemeral artifacts, along with the language we use to talk about them. Rights lack a certain

⁴² *Institutional Economics* 100-101.

⁴³ J R Commons, *Legal Foundations of Capitalism* (1924) 6-9.

substance, but they do have a certain reality about them. Using Shakespearean language, Commons writes:

In one sense the right does exist as a 'fact' . . . but . . . the 'fact' is only a mental process, a hope, a fear, an expectation that since a certain working rule has been applied in the past, it will be applied again in similar cases. . . . For as an actual, living reality, the right exists only in the expected behavior of officials and there is where the prudent lobbyist, businessman or workingman locates it and finds its real substance. Idealism gives to these airy nothings a local habitation and a name, but sagacity inquires what will the judge on the bench, the jury in the box, the executive on the highway, *do*?⁴⁴

Historical time, which conventional economists had (and still have) no time for, is at the heart of Commons' 'working rule', which imaginatively fuses together 'past', present (in 'expectation'), and future (in 'hope').

Commons' claim about the ephemeral character of rights and of language may be disturbing to those who are uncomfortable with indeterminacy and open-endedness, the material of genuine conversation. Those concerned with rights, for Commons, are at once metaphysicians (who are concerned with the reality question 'What is there?') and poets à la Theseus:

[T]he metaphysical notion that there exists somewhere an objective world of rights . . . goes along with the metaphysical notion that there is somewhere an entity 'the state' apart from the officials who determine and execute the will of the state. These metaphysical notions have, indeed, a powerful influence on men's minds, simply because man lives in the future and acts in the present. Thus constituted, he projects outward into a world of ideas his hopes and fears, and gives to his expectations a local habitation and a name.⁴⁵

Identifying 'rights', for Commons, is an act of the imagination, an act that involves abduction. Different people, who will have different background experiences and different imaginative capacities, will abduct differently. An engagement with these differences will enable an exploration of factors and forces that shape the imagination. This exploration, as readers of *The Legal Imagination* will appreciate well, is itself an imaginative activity through and through.

⁴⁴ Ibid 112.

Commons' work has been and remains unjustly neglected. The induction-deduction dichotomy seems to be a hard habit of thought and expression to break. Consider, for example, this fragment from Richard Posner's *Overcoming Law* (1995):

In reasoning from the top down, the judge or other legal analyst invents or adopts a theory about an area of law—perhaps about all law—and uses it to organize, criticize, accept or reject, explain or explain away, distinguish or amplify the decided cases to make them conform to the theory and generate an outcome in each new case as it arises that will be consistent with the theory and with the cases accepted as authoritative within the theory. The theory need not be, perhaps never can be, drawn 'from' law; it surely need not be articulated in lawyers' jargon.

In bottom-up reasoning, which includes such familiar lawyers' techniques as 'reasoning by analogy' and interpretation according to 'plain meaning,' one starts with the words of a statute or other enactment, or with a case or a mass of cases, and moves from there—but one doesn't move far. The top-downer and the bottom-upper do not meet.

I am associated with several top-down theories. One, which is primarily positive (descriptive), is that the common law is best understood on the 'as if' assumption that judges try to maximize the wealth of society. Another, primarily normative, is that judges should interpret the antitrust statutes to make them conform to the dictates of wealth maximization.⁴⁶

A Commons reader in modern times will be disturbed to hear an old 'controversy . . . over the "deductive" and "inductive" methods of investigation' being replayed here. That which Posner call 'reasoning from the top down' could be constructively given another orientational metaphor if the pervasive process of abduction (a 'theory' does not fall from the sky) is not selectively ignored. (Our efforts here to make sense of the word 'abduction', along with the words 'induction' and 'deduction', can be imagined as involving abduction.) So too with 'bottom-up reasoning'. Abduction, we might imagine, is what people *do* all the time, even when consciously concentrating on the mechanics of deduction or induction.⁴⁷

⁴⁵ Ibid 364.

⁴⁶ R A Posner, *Overcoming Law* (1995) 172.

⁴⁷ W J Samuels, 'Signs, Pragmatism, and Abduction: The Tragedy, Irony, and Promise of Charles Sanders Peirce' (2000) 34 *Journal of Economic Issues* 207.

A Commons reader may have grounds for hope that history will not merely repeat itself, for Peirce's word 'abduction' is slowly finding its way into talk about the activity of legal reasoning.⁴⁸ Yet there will be some who have an interest in putting walls around the word. Here is Posner in *The Problems of Jurisprudence* (1990):

The fact that interpretation is a mysterious process, distinct from logic and scientific observation, is not in itself a challenge to law's objectivity. The process by which scientists choose which hypotheses to test, the process Charles Sanders Peirce called 'abduction,' is mysterious too, but we know how it works, because we can verify the results. We can often verify the results of communication as well. If I send out invitations to a party at a specific time and address, I am hypothesizing that the recipients (or some of them) will appear at that time and that address. If they do, the hypothesis is supported, and with it the theory of workable communication from which it is derived.⁴⁹

Posner could do well to avoid unnecessarily limiting that which he could 'know' and 'verify'. Concerning his thin example of the party, he could seek to know *why* recipients decide to appear or not. If they come to believe, rightly or wrongly, that they are merely tools for an experiment regarding a 'theory of workable communication', then they may never come. What would such an outcome *mean*? The *meaning* of the invitations and of the theory could be a central topic of investigation. In the process, Posner might find himself asking questions such as these: 'What did Peirce mean by "abduction" anyway? How might I judge my own abductions regarding his use of the word? What did my reader of *The Problems of Jurisprudence* think I meant in my use of the word?'

* * *

Such potentially disorientating questions would be material for an economics of the imagination, an economics that could re-imagine that which we call 'the economy'. In *The Economics of the Imagination* (1980), Kurt Heinzleman offers these suggestive remarks about the words 'economy' and 'economics':

⁴⁸ See, for example, L L Schroeder, 'Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination' (1991) 70 *Texas Law Review* 109; S Brewer, 'Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy' (1996) 109 *Harvard Law Review* 923, 926, 942, 945.

'Economy' is derived from the Greek word *oikonomia* meaning the management of a household. In English usage, economy suggests both frugality and efficiency; by extension, it applies to the management of many structures, political and domestic, commercial and aesthetic. In its largest sense, the word asserts our capacity for creating intellectual structures and for imaginatively regulating them. . . .

When 'economy' pertains to the management and structure of *the* economy in the modern, Western sense, then we may understand *economics* as a system of discourse used to order this political economy, to make it consistent and workable. But as a total metaphor, 'economics' remains both self-referring and expansive. . . . *The Economics of the Imagination* is a study of this notoriously flexible metaphor – of how, linguistically, 'economics' is produced and of how, imaginatively, it is used. . . . 'The achievement of economy is an art,' observes the economist A. L. Macfie. 'Economics in the full sense does not just examine facts; it rationalises, indeed *creates the experience with which it deals.*' In assessing the value of this experience, in composing and employing the metaphors which serve as vehicles for conveying that value, the labor of the economics becomes comparable to the poet's. More importantly, insofar as economics posits its own imaginative economy, such discursive rationalizing of events will necessarily affect, as in every other creation of the imagination, the very nature of the 'facts' which it structures.⁵⁰

How might Heinzelman's reader, along with the character who goes by the name *Homo economicus*, 'rationally' decide whether or not it is worth reading Heinzelman's book? How is she to judge his enterprise of the imagination about another enterprise of the imagination, namely the discourse that goes by the name 'economics'? With what language is she to use? What might its limits be? White's *The Legal Imagination*, I suggest, can equip a reader well for responding to those questions (*Rationality).

Heinzelman's book, 'a work of literary criticism',⁵¹ is concerned with nothing less than the place of 'economics' in modern Western civilization. What can Heinzelman hope to achieve? What confidence can he possibly have in whatever grounds he invents for his cultural criticism? Let us hear from him again:

Unfortunately, the method of this book may be precisely what many social scientists distrust. An 'ideological' essay, discussing the verbal, philosophical, and structural relations between

⁴⁹ R A Posner, *The Problems of Jurisprudence* (1990) 105.

⁵⁰ K Heinzelman, *The Economics of the Imagination* (1980) ix-x (footnote omitted).

⁵¹ *Ibid* x.

concepts of 'value,' cannot derive its method from the exhaustive, inclusive model preferred by the empirical scientist. And the social scientist's distrust of an empiricism which is not 'value-neutral' may be reciprocated by the literary student's indifference or hostility to economics in either its theoretical or its raw, statistical form. In short, almost every reader of this book is likely to find one set of texts (say, the poetical ones) more familiar and less threatening than another set (the economic tracts, for instance). But through this juxtaposition of known texts with stranger ones (whichever ones they happen to be for any given reader), perhaps some small light can also be shed on the burden which is propagated by our academically specialized labors. It is, in any case, a burden whose weight is measured again and again in both the economic and the literary works discussed below. Because, as I shall argue, economics governs the reading of a book as much as the writing and publishing of it, I would urge all readers to proceed with the economics of their own imaginations attuned to its specialized computation of gain and loss.⁵²

How can 'the economics of their own imaginations' become 'attuned to its specialized computation of gain and loss'? Might not the word 'economic' lose its ordinary meaning (with the familiar having become alienated) whilst reading the 'literary' *The Economics of the Imagination*? As a serious reader of *The Legal Imagination* will know, artists from time immemorial have engaged in the 'juxtaposition of known texts with stranger ones', not the least for the purpose of rendering the strange familiar and the familiar strange. Might we do well to juxtapose *The Economics of the Imagination* with *The Legal Imagination* for that purpose? Where might this analogizing take us?

* * *

Speaking of the analogical imagination, for White, as expressed in '*This Book of Starres*', it is constructive to think of the reading of a book as analogous to the activity of learning a language. In his use of the analogy, White directs his reader's attention to difficulties that he himself and his reader confront:

If you imagined yourself asked to think about an experience of language-learning, a fundamental problem would quickly present itself: how much attention should you give to the particular way in which you yourself learned the language, how much to the language you learned? One danger is that you would focus exclusively on the language as an external

⁵² Ibid x-xi.

object, erasing your own experience, and in doing so create the pretense that what you saw and learned was simply there, and that it would, or should, be the same for everyone. Working in this way you would pretend to disappear into a transparent pane of glass through which this reality could be seen. But the knower is always part of the known; the language that you learn is always different from the language I learn: my Herbert can never be exactly the same as yours. Meaning does not lie in the text, or in the culture, to be picked up like a stone, but an experience of interaction, which is naturally different for each of us.

Yet this perception can be carried too far, to the point of conceiving of the text or culture as having no reality beyond the one we give it, to thinking of the reader, or traveler or anthropologist, as the only real actor in the universe, the only intelligible speaker. While your experience and mine of a new language, or of Herbert, will not be identical, they should have important similarities and overlaps, and this should be true not only of particular phrases or poems, but of the process by which they are learned. If we both succeed at learning French, we shall, after all, be able to speak to one another in a new way, and to others as well, for our versions of that language will be to some degree mutually intelligible.⁵³

If we reject the problematic visual analogies for knowing, we may find ourselves between the 'objective' and that which is commonly set in opposition to it, namely the subjective. Concerning the 'imagined', that which we call 'reality' can never exist separately. All that ever exists for humans, is imagination-reality, an imaginary reality, or real imagination.⁵⁴ (Various distinctions can and should be imaginatively made about this reality.) The root of the word 'reality' is the Latin 'res', meaning a property, a possession, a thing – like a bit of 'real estate.' We might do well to consider how we should talk about what we know when we know, say, 'White' and 'the law', and so on. Are we seeking to 'own' and 'control'? If so, does such an orientation lead us to 'objectify'?

In this Thesis, which seeks neither 'objective' nor 'subjective' knowledge (at least to the extent that they are falsely imagined as in opposition to one another), we might do well to apply what White says about Herbert in the above passage to our reading of him: my reading of White will differ from your reading, yet they should have similarities. Whatever overlaps there might be, in letting White speak a lot I am

⁵³'*This Book of Starres*' xiii-xiv.

hoping that my image of his image of the law does not unduly influence the transformation of your image of his image (*Image).

For White, the activity of reading is analogous to the 'experience of travel, which cannot be reduced to photographs or views or anecdotes, but works a shift in one's sense of the world and one's place within it.'⁵⁵ White's book on Herbert may be imagined as a travel guide into the world of Herbert's poetry. He suggests this resemblance when he says more about the association between himself and his reader in their relation to Herbert:

In writing about my experience of Herbert's language, then, my task is neither to pretend to erase myself nor to claim that my experience is the only relevant reality, but to find a way to do two partly inconsistent things: to recognize my constant presence in everything that is seen or said, and at the same time to keep attention focused on what matters most, the language and the poems as they are seen from this point of view. We ought not to deny the objective reality of the poetry, but we should recognize that this same reality is perceived differently by different people, just as a landscape or a flower is. This book is directed not so much at Herbert's poetry, then, as if it could be simply seen for what it is, but at our respective experiences of that poetry, which after all exist for us only as we participate in their making. I shall speak out of my own experience, to the reader's experience, telling her or him not 'what is there' so much as what one traveler's sense of it has been. I hope you will recognize the place I describe, but I know it will – and should – be different for you.⁵⁶

Again, we can apply what White says here to our reading of him. Concerning his image of the law, this Thesis is directed not so much at his image as if it could be 'seen' for what it is, but at our respective images of it. In talking about the kind of knowledge we are concerned with, we may do well to work with White's key word 'experience' (*Experience), a word that he uses in a way that challenges the simple opposition of objective versus subjective.

* * *

⁵⁴ This expression about the relation between imagination and reality draw from J H Miller, *Poets of Reality: Six Twentieth-Century Writers* (1965) 275.

⁵⁵ Ibid xi.

⁵⁶ Ibid xiv.

White's efforts to imaginatively transcend the objective-subjective dichotomy haven't gone unnoticed. His efforts in *Justice as Translation* caught the attention of an economist who is also in the enterprise of reclaiming rhetoric (*Rhetoric). In addition to *Justice as Translation*, McCloskey's *The Essential Rhetoric of Law, Literature, and Liberty* (1991) reviews Richard Posner's *Law and Literature* (1988) and Stanley Fish's *Doing What Comes Naturally* (1989). Before McCloskey are three books 'on the connections between law and literature'.⁵⁷ Here is a fragment from what he has to say on them:

White speaks much of community He begins by scutinizing . . . the language of economics, as in the law and economics movement, led by Posner. He finds them bad for the speech community, since they try to shut everybody up. The large middle of the book then turns to the language of law, in particular American constitutional law. White finds in a rhetorical analysis of opinions the materials for a third language. Making texts out of other texts, as the law does, is 'translation.' A good translation acknowledges the nontransparency of language, but tries anyway. It adjusts the rights of the original text to the rights of the reader, a model for justice, *le mot juste*.⁵⁸

White's writing is engaging, if not as engaging as Fish's. White wants to change the way we think about law and literature for the good of both, and for the good of human communities generally, whereas Posner wants us to stop instead with law and economics.⁵⁹

Posner depends in *Law and Literature* on a theory of theory, in literature and in science, that any reasonable person must reject, if the reasonable person has had the time to think it through. The erroneous theory in brief is that literature and science are two cultures, the one about value, the other about fact, the one for entertainment, the other for knowledge. On this theory the law and literature movement and the law and economics movement are contending for the soul of law. Should law be literature or science, value or fact? I am sorry to say that most intellectuals mouth such things. Fish and White and I do not. We are reasonable. Posner is not.⁶⁰

Interpretation frightens people. People want rules, procedures, mechanized thinking, anything but judgment and the tacit dimension. . . . Like many of us, Fish is amazed by this fear, because he sees ordinary practice keeping us rooted enough for practical purposes. The

⁵⁷ D N McCloskey, 'The Essential Rhetoric of Law, Literature, and Liberty' (1991) 5 *Critical Review* 203, 214.

⁵⁸ Ibid 205.

⁵⁹ Ibid 205-6.

⁶⁰ Ibid 206.

fear is that interpretation is a license to say anything that comes into one's head (Posner wants to reduce interpretation to a determinate puzzle on just these grounds). . . . One obstacle . . . is the dichotomy of objective and subjective, popular for a couple of centuries now The logical empiricist who does not understand interpretation will start shouting that then we would have no 'standards,' by which she means God's objectivity. Her irrationalist double, on the other hand, welcomes the putative lack of standards, being a devotee of the subjective and the touchie-feelie.⁶¹

The alternative to the pointless quarrels between the objective and the subjective is, to coin a term, the conjunctive. The conjunctive is what we know together, in society, by virtue of common speech. It is all we can argue about. We have a history together or apart, and this is what makes interpretation possible. . . . The law is conjunctive. The choice is not 'civilization and order versus the anarchy of the individual will,' the objective versus the subjective, as Posner and other conservatives would like us to believe. The third thing, the conjunctive, is what we know together and can in fact argue about to a conclusion. We do so every day, in courts of law and in kitchen councils and in other communities.⁶²

White . . . is good on the interdisciplinarity of law and literature, to which . . . Posner [is] deaf, and he complains of the ways we talk about it: the 'findings' of one 'field' should, it is often said, be 'made available' to another, as though history or economics or philosophy, say, should pass a plate with the truth on it over to the law. His alternative is 'composition,' that is, using two different things to make a third. He wants to use literature and law, changing both by their conversation and making thereby a third thing.⁶³

In reclaiming rhetoric, McCloskey seeks to rediscover the 'ordinary', including the demand for 'judgment'. For McCloskey, the objective/subjective split is too simple to do 'justice' to our talk about the process of knowing. To the extent that Posner has imprisoned himself in the dichotomy, he will fail to do 'justice' to the 'third'-orientated White. McCloskey, by my reading, makes a sound judgment for what 'any reasonable person must reject'. The present 'reasonable person' considers that the use of the word 'conjunctive' in the context of claims about what is 'out there' will assist other reasonable people in appreciating that there are significant limits to the dichotomy.

⁶¹ Ibid 212-13.

⁶² Ibid 214.

⁶³ Ibid 215-16 (quotation marks omitted).

An autobiographical remark: McCloskey's essay extended an economics teacher's interest in the topic of justice and in the role of the *ear* in it (*Listening). The teacher found it difficult to find a community in economics in which to pursue this interest – 'THAT'S MERELY SUBJECTIVE, AND OUTSIDE ECONOMICS'. The seemingly next best alternative for him was to go to law school.

* * *

Let us return to Dyzenhaus. How does he imagine 'the legal'. To assist with a response, let us hear more from his *Judging the Judges, Judging Ourselves*:

[I]n the 1960s and 1970s, the majority of South African judges began to chip away at the foundation of their duty to uphold the rule of law. In decision after decision, they found more or less implicit indication that the legislature wished its administration to act unconstrained by fundamental legal principles. Academics who commented on this process warned the judges in very clear terms that such chipping would eventually result in a complete dereliction of their duty. But the majority of judges ignored these warnings and by the later 1980s, with Rabie at the helm, the judiciary had reached the point where it betrayed the very 'principles to which it owe[d] its existence'.

Old order liberal judges . . . adopted a very different approach. They believed that their oath to administer justice bound them to moral as well as legal values. For these judges, the values were the most fundamental norms of the legal order. But such values are fundamental not because they are at a deeper level than the law made by a superior legislature but because they are constitutive of what the law of such a legislature is. . . .

. . . Had the majority of judges applied the law in a way that made best sense of their judicial oath, the government would have had to choose one of two options. It could have openly announced that it could not abide by the rule of law and maintain apartheid as it wanted, thus explicitly choosing a lawless course, or it could have subjected its administration to the constraint of the fundamental legal principles sketched earlier.

The first option would have significantly decreased support for the government both in the international community and at home. And had the government taken this option, judges faithful to their duty could have denounced such statutes for illegality—not for lack of compliance with some extra-judicial ideal of justice, but for failing to be law. In other words, judges could then condemn the law not simply because they disagreed with it, but because the law profaned principles fundamental to maintaining legal order. In contrast, the

second option, government submission to the rule of law, would have opened up precious space for opposition to apartheid from within.

In either case, the judges would have confronted the government with a dilemma, the dilemma of the rule of law. . . . [T]hat dilemma manifest itself for Bram Fischer as he contemplated taking his fight against apartheid underground. In his case, the dilemma was a genuinely moral one. His commitment to the rule of law required him to recognise that the values which he decided to pursue by revolutionary means were put at risk by a revolutionary course, and, more important, could still be fought for by legal means. In other words, the moral quality of his dilemma stems from the fact that a commitment to the rule of law informs both of its options.

In the case of the South African government, however, the rule of law dilemma was not moral but strategic. It was a dilemma between accepting the costs as well as the benefits of operation under the rule of law or doing without the legitimacy which attaches to government under the rule of law.

In confronting the government with the rule of law dilemma, judges would have affirmed their commitment to a process that 'does not defer to the violence of administration'; rather, the process seeks to impose the constraints of legality on a state which licences that imposition by its claim to be a *Rechtsstaat*, to be a state which governs in accordance with the rule of law. Such a commitment exhibits fidelity to the law because it shows that the rationale for having courts is not, or not mainly, that of Judges Smalberger *et al.*—the necessity for preserving us from the war of one against all. Rather, the rationale is the potential of courts to articulate and maintain a 'constitutional vision', one informed by an understanding that the duty judges undertook in their oath to administer the law was one to 'administer justice to all persons alike without fear, favour or prejudice'.

The South African judiciary let the government escape from the rule of law dilemma and for that the judges are accountable, and not only for dereliction of duty. . . . To place the government in the rule of law dilemma would have been a deeply political act and judges do not like to be seen to be engaging in politics. But . . . when the politics in which judges engage amount to upholding the rule of law, requiring of a government that it live up to ideals which it itself, however cynically, professes, then judges are simply doing the duty undertaken in their oath of office. They are demonstrating their accountability to the law to which governments, who wish to claim the legitimacy of government through the medium of the rule of law, are also accountable.

Judges who assume that a legislature must be taken to intend to respect the rule of law do so in order to make sense of their role as one faithful to the duty to administer the law. And that tells us that the judges' duty is to moral ideas which play a role in constituting what they

should take to be the positive law, even in the absence of a written constitution which gives them such authority. If judges fail to do that, the South African example shows that they fail in their duty as judges. . . .

One must be careful here not to err on the side of over- or underestimation. Liberal judges could not have stopped apartheid and one can safely say that any significant act of judicial resistance would have been overridden by the government. But . . . Each time a person from within the ranks of the white establishment broke those ranks to point out how uncivilised their society was, the others were threatened with being forced to rethink their position.

Bram Fischer's example is the most striking here. And it is worth noting that despite Judge Ackermann's care, even now, in trying to limit the implications of his resignation from the Bench, his resignation was perceived at the time as a severe comment on the injustice of apartheid precisely because he could not be dismissed as a pawn in the total onslaught. There is no doubt that a mass resignation of the few liberal judges, judges who condemned apartheid not only as a repugnant ideology but because of its subversion of the rule of law, would have rocked the government and white South Africans.

However, I believe that the liberal judges were right to remain in office. Their situation was at the time one of tragic moral choice . . . [:] one in which no choice can be made without ignoring the legitimate pull of important moral considerations. We have nevertheless to choose in such situations. And we have to try to make the best choice without the comfort, however the choice turns out, that the ignored considerations will cease to seem powerful. In other words, there is in the tragic situation no univocal right answer. Any decision brings with it regret because even when a decision seems on balance the better choice, the reasons for not doing it remain.

. . .

Using Robert Cover's terminology, we can say that the choice to become a judge was 'jurispathic' since it killed off other options, including radically different ways of understanding what it was to pursue an ideal legal order. Think in this last respect of Bram Fischer, who decided that the only way to create a society which respected law was to take the path of illegal action. The choice to become a judge was once which expressed commitment to the morality of judicial office, but that then raised the question of the contours of the moral space in that office.

It is important to see that once in office a liberal judge confronted the rule of law dilemma in a particularly painful way. Even the most liberal judge who took office under apartheid could not avoid implementing its law. He had to accept that even laws whose content he found abhorrent and whose provenance he regarded as illegitimate had a legitimate claim on

his duty to administer the law. He therefore not only made himself complicit in an injustice he recognised as such, but gave to that injustice the aura of legitimacy.

What made a liberal judge different from other judges was not, however, the fact of his complicity in apartheid but his conception of fidelity to the law. By refusing to elevate the formal stakes (the parliamentary sovereignty defence), he kept alive the idea that the law provides opportunities to judges to make the law meet its aspiration to treat all of its subjects equally. However, . . . in keeping that idea alive, he also helped to legitimate the apartheid government by giving some genuine substance to the claim that the rule of law did exist in South Africa.

For the liberal judges, then, it was very much a case of 'damned if you do, damned if you don't'. But without them, there would have been little, perhaps no, point to the efforts of those few lawyers in the academy in the 1960s and 1970s who sought to provide their students with a critical perspective on the apartheid legal order, or to the efforts of those few lawyers in practice, attorneys and advocates, who were prepared to use the law against the law in the fight against apartheid.⁶⁴

If a revised edition of *The Legal Imagination*, or a book resembling it, is ever composed, that passage would seem to be particularly fit for inclusion. Let us attend to several parts of the passage that relate to the law as an enterprise of the imagination.

Where in *The Legal Imagination* might the passage be placed? The final chapter, 'The Education of the Lawyer,' immediately comes to mind.⁶⁵ More specifically, the chapter's opening section: 'Defining Our Subject Matter – What Is the Law and Where Can You Find It?'⁶⁶ White begins the chapter by questioning the aptness of 'much talk about legal education'.⁶⁷ This talk suggests 'that there is in the world an identifiable thing or body of knowledge called "law" which is transferred from teacher to student.'⁶⁸ White goes on to invite his reader to pay close attention to talk that might imply that 'the law' is a solid object out there for all to see. The opening sentence in the passage from Dyzenhaus contains such talk. He speaks of South African judges beginning 'to chip away at the foundation of their duty to uphold the rule of law.' The image here is a readily identifiable thing, 'the rule of law', that one can 'uphold'. The

⁶⁴ Dyzenhaus, op cit, 158-165 (footnotes omitted).

⁶⁵ *The Legal Imagination*, Chapter 7.

⁶⁶ Ibid 928-37.

⁶⁷ Ibid 927.

⁶⁸ Ibid.

story that follows the sentence both reinforces and undermines this image. Attending to the tension here may be of service to talk about transformative constitutionalism.

In the second paragraph, we hear about certain judges who 'believed that their oath to administer judges bound them to moral as well as legal values.' This utterance may seem readily understandable and unproblematic. We will do well to resist imagining 'values' as 'things' that can serve to 'bind' people, like a straight-jacket on a violent prisoner. Values are processes of valuing. One values 'the rule of law' by doing certain activities, such as aspiring, believing, judging, killing, pleading, thinking. In writing *Judging the Judges, Judging Ourselves*, Dyzenhaus is valuing the rule of law by making claims about what 'it' is and ought to be.

'Had the majority of the judges applied the law ...' Here we go again: 'the law' seems to be a solid thing. Could these judges simply not see what was before their eyes?

The distinction between the inside and the outside was fundamental to the *apartheid* order, perhaps needless to say. The distinction is also fundamental to law and to Dyzenhaus's talk about it. For him, 'government submission to the rule of law ... would have opened up precious space for opposition to apartheid from within.' Whilst talk of 'space' may direct our imaginations to a physical thing, we might do well to pay close attention to the word 'opposition', which can serve to direct us to a rhetorical activity. Dyzenhaus draws from the work of Lon Fuller,⁶⁹ who is perhaps best known for stressing that law is an activity or process rather than an object, in the form of a book of rules.⁷⁰ This activity can have a distinctive 'internal morality', to use Fuller's phrase. Dyzenhaus follows Fuller in resisting the sharp distinction between law and morality, a distinction that the majority of the apartheid judiciary was guilty of accepting, according to Dyzenhaus. For him, it is the very existence of an 'internal morality' of law that created what he calls the 'the dilemma of the rule of law'. For me, Dyzenhaus' description of the dilemma that Bram Fischer faced in resisting the apartheid order serves excellently for identifying 'the law' not as a thing but as an 'aspiration[al]' *activity*. This is an activity with imaginative possibilities: 'the potential of courts to articulate and maintain a "constitutional vision"'.

⁶⁹ Dyzenhaus, *op cit*, 165 and 183.

⁷⁰ See, for example, M A Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society* (1994) 234.

Speaking of Fuller, Dyzenhaus' remark that 'no choice could be made without ignoring the legitimate pull of important moral considerations' brings to mind the fiction for which Fuller is widely known, *The Case of the Speluncean Explorers* (1949).⁷¹ The case concerns five cave explorers trapped after a landslide. With the certainty of death by starvation coming before rescuers, one of the explorers is killed and eaten, and the survivors are convicted of violating a law making it a crime, to be punished with death, that one 'willfully take the life of another'.⁷² Tatting J, who claims that he is 'usually able to dissociate the emotional and the intellectual',⁷³ is swamped:

The more I examine this case and think about it, the more deeply I become involved. My mind becomes entangled in the meshes of the very nets I throw out for my on rescue. I find that almost ever consideration that bears on the decision of the case is counterbalanced by an opposing consideration leading in the opposite direction. My brother Foster has not furnished to me, nor can I discover for myself, any formula capable of resolving the equivocations that beset me on all sides.

I have given this case the best thought of which I am capable. I have scarcely slept since it was argued before us. . . .

Since I have been wholly unable to resolve the doubts that beset me about the law of this case, I am with regret announcing a step that is, I believe, unprecedented in the history of this tribunal. I declare my withdrawal from the decision of this case.⁷⁴

Tatting J should have jettisoned the emotional/intellectual split and to begin to think and talk like a whole person, who does not need the security of a 'formula' to generate a univocal right answer and who is willing and able to take on an authentic, creative existence. That is one moral of Fuller's story. Dyzenhaus suggests that the apartheid judiciary would have done well to adopt that moral.

Having spoken of law as an activity with imaginative 'potential' and with an internal morality, Dyzenhaus insists that *law is politics*, without sounding like a self-identified 'crit', who would put an end to a 'legal' conversation. Dyzenhaus uses the word 'political' seemingly with the hope of enriching a conversation about the complex, multi-vocal activity that 'the law' can and should be.

⁷¹ L Fuller, 'The Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review* 616.

⁷² *Ibid* 618.

⁷³ *Ibid* 626.

Without the 'aspiration to treat all of its subjects equally', Dyzenhaus seems to be suggesting that 'the law' ceases to exist. Of course 'the law' cannot treat all of its subjects equally in many respects. And of course there will be disagreement about when unequal treatment is justified. But the *aspiration* begins a conversation in which the activity of justification can and should flow. *Judging the Judges, Judging Ourselves* can serve as a vitally important resource for augmenting the quality of justification that is done in the name of the law.

Dyzenhaus' book does not simply describe objects in the 'legal' world that are 'out there'. The book directs attention to a process of talking that can and should have certain aspirations, aspirations that can be forgotten, the consequences of which can be a terrible tragedy. His attention to aspirations can assist us in more fully understanding what a lawyer is *doing* when she is 'thinking like lawyers'. One *doing* is creating a character. In this regard, the example of Bram Fischer is striking. As Fischer struggled to work out how to respond to the apartheid order (not the least with the hope of constructively reconstituting it), he worked out an identity for himself. In doing so, he defined not only himself but also the apartheid order. What became of the apartheid order is a matter of judgment, which Dyzenhaus takes the liberty and the duty of delivering. In doing so, Dyzenhaus also creates a character for himself. He is an imaginative writer who invites his reader to respond as one who integrates their emotional and intellectual sides in a manner that negates any sense of their apart-ness. His book can be imagined as an enterprise of the imagination about the law as an enterprise of the imagination. The tragedy and inhumanity of the apartheid order, for him, is the result of the failure of moral and political and legal imagination.

To turn now to the future in South Africa, a transformative constitutionalism worthy of the name must take the imagination seriously. Dyzenhaus' book is a fine place to start, especially if read in the echo of White's *The Legal Imagination*.

⁷⁴ Ibid 631.

Integration

When White went to Amherst College as a freshman, there was an institutionalized effort ‘to preserve the ancient notion of the whole man’.¹ At the heart of Theodore Baird’s famous freshman composition course, which had a profound impact on White (*Questioning), was an image of education drawn from *The Education of Henry Adams* (1918). Baird’s *The First Years* (1931) contains a passage from Adams’ book, a passage that includes this suggestive sentence:

From cradle to grave this problem of running orders through chaos, direction through space, discipline through freedom, unity through multiplicity, has always been, and must always be, the task of education.²

The activity of ‘running . . . unity through multiplicity’ may well be a central image at work in White’s transformative constitutionalism, an activity that could aptly be called integration. Working with White’s key word ‘integration’, let us try this activity.

* * *

‘There is a great concern with metaphor in this course’, says White in a writing assignment the end of *The Legal Imagination*.³ Anyone who is familiar with Baird’s composition course will sense a similar concern with metaphor.⁴ Baird’s concern did not emerge from a vacuum. His friend and colleague Robert Frost, who had much to say and suggest about metaphor, had a long teaching career at Amherst. For Frost, as expressed in *Education by Poetry* (1931), metaphor as an implement of the poetic imagination pervades of our lives with language:

¹ This utterance comes from an address to the 1962 graduating class, quoted in R Varnum, *Fencing with Words: A History of Writing Instruction at Amherst College during the Era of Theodore Baird, 1938-1966* (1996) 27.

² Quoted in T Baird, *The First Years: Selections from Autobiography* (1931) 48.

³ *The Legal Imagination* 956.

Poetry begins in trivial metaphors, pretty metaphors, 'grace' metaphors, and goes on to the profoundest things that we have. Poetry provides the one permissible way of saying one thing and meaning another. People say, 'Why don't you say what you mean?' We never do that, do we, being all of us too much poets. We like to talk in parables and in hints and in indirections – whether from diffidence or some other instinct.⁵

I have wanted in late years to go further and further in making metaphor the whole of thinking We . . . ask boys in college to think . . . but we seldom tell them it is just putting this and that together; it is just saying one thing in terms of another.⁶

Those claims are deeply at odds with ocularcentric Enlightenment thinkers who claimed that language can be made to function as a 'perspicuous' tool for objective inquiry, can be literal and thus devoid of metaphor, with their unstable meanings which are the material of dangerous rhetoric (*Metaphor; Rhetoric).

Frost thought we would do well to attend to the metaphors we inescapably use and live by, not the least because they 'will break down at some point'.⁷ As an example, the playful Frost tells us this story:

Somebody said to me a little while ago, 'It is easy enough for me to think of the universe as a machine, as a mechanism.'

I said, 'You mean the universe is like a machine?'

He said, 'No. I think it is one . . . Well, it is like . . .'

'I think, you mean the universe is like a machine.'

'All right. Let it go at that.'

I asked him, 'Did you ever see a machine without a pedal for the foot, or a lever for the hand, or a button for the finger?'

He said, 'No—no.'

I said, 'All right. Is the universe like that?'

And he said, 'No. I mean it is like a machine, only . . .'

' . . . it is different from a machine,' I said.

He wanted to go just that far with that metaphor and no further. And so do we all. All metaphor breaks down somewhere. That is the beauty of it. It is touch and go with the

⁴ See Varnum, op cit, 46.

⁵ R Frost, 'Education by Poetry' (1931) *Amherst Graduates' Quarterly*; reprinted in H Cox and E C Lathen (ed), *Selected Prose of Robert Frost* (1949; 1966) 33, 36-7.

⁶ Ibid 38 and 41.

metaphor, and until you have lived with it long enough you don't know when it is going. You don't know how much you can get out of it and when it will cease to yield. It is a very living thing. It is as life itself.⁸

When 'metaphor breaks down', we are offered an opportunity for becoming self-conscious composers of meaning, composing new orders out of chaos. The experience of 'break down' may be uncomfortable, especially when a metaphor 'frames' a person's image of the world (*Image).

With metaphor imagined as a medium for creating orders, the activity of 'imagining like a poet' might come to resemble 'thinking like' those who might be imagined as having little or no connection with poets, such as scientists. Baird's essay *Darwin and the Tangled Bank* (1946) has much to suggest possible connections:

Plainly Carlyle belongs to literature. Darwin's position is obscure. A popular textbook places his at the opposite pole, remarking that his work 'cannot be said to belong to literature, if in the definition of literary work is presupposed an effort towards artistic expression.' Yet Darwin, who certainly never thought of himself as a writer like Carlyle, was deeply concerned with literary composition Darwin's subject – the face of the earth, the processes of nature – had long been within the scope of literature When in the *Origin* Darwin came to express how Nature as a whole seemed to him, he . . . used a metaphor. Nature, he said, is like something else, a struggle for existence, in which the fittest survive. . . . He took pains to say that the struggle for existence is not a fact but only a figure of speech. He stops dead in his tracks, when first using the term, to explain, 'I use this term in a large and metaphorical sense,'

The figure of speech . . . points to a complicated event. A blow by blow account, with victory and defeat determined by the universal umpire, the score carefully kept, is impossible in the struggle of any organism's existence. How little he knew in detail Darwin is constantly reminding the reader: 'We know hardly anything about. . . . This ought to convince us of our ignorance. . . .' . . . For him exists a language problem

Galton's praise of Darwin, that he had 'studied veracity as the highest of arts,' belongs to him both as an observer and as a writer. Actually it is hard to see how these two processes

⁷ Frost, op cit, 38-39.

⁸ Ibid 40-41.

can be separated and distinguished. It is easier to conclude that in 1859, at one of the great moments in modern thought, literature and science were united.⁹

Plainly Baird belongs to composition, alongside Carlyle and Darwin. Baird's great talent, we can be sure, was his ability to place his composition students into the position of experiencing a language problem, the working out of which involves the whole person, not just the intellect. Baird's subject, the struggle of imagination in the activity of composing with language, is a complicated event, aided with a talent for metaphor. For Baird, a metaphorical phrase is much more than a mere adornment. In a world not of stable ground but of constant flux, metaphors are the medium in which a composer – beginner, intermediate, and advanced – can set sail.

* * *

The Legal Imagination sets sail with seven chapters, each of which is divided into groups of selected readings, commentary, and questions, which lead to writing assignments. The readings, which make up a large proportion of the book, include not only case opinions and statutes and legal commentary but also poems (such as Herbert's 'The Pulley', Dickinson's 'The Last Night That She Lived', and Frost's 'Directive') and excerpts from various kinds of works, including novels (such as Twain's *Huckleberry Finn* and Proust's *Remembrance of Things Past*, philosophical dialogues (such as Plato's *Republic*), plays (such as Aeschylus' *Oresteia*, Shakespeare's *Antony and Cleopatra*), treatises (such as Aristotle's *Rhetoric* and Hooker's *Of the Laws of Ecclesiastical Polity*), literary criticism (such as Forster's *Aspects of the Novel*), histories (such as Gibbon's *Decline and Fall of the Roman Empire* and Clarendon's *History of the Rebellion and Civil Wars in England*). The diversity of readings may be read as a strategy for a project of imaging a legal pluralism that takes seriously both similarity and difference, both unity and diversity:

What might appear to be something of an eccentric diversity in the selection of passages has a real purpose: it is a way of urging the student to bring together the various elements of his own education (however disparate they may seem to be), a way of claiming that nothing is

⁹ T Baird, 'Darwin and the Tangled Bank' (1946) *American Scholar*; reprinted in T Baird, *The Most of It: Essays on Language and the Imagination* (1999) 162, 163-71.

irrelevant until it is shown to be. One who knows about biology or mathematics or music ought to be able to draw connections between these activities and the law similar to those I draw between law and literature. The idea is that the law should be compared not just with literature but with anything that the reader knows, that it should be seen as a part of a larger individual and intellectual life. Accordingly, there is one other resource upon which the student is constantly encouraged to draw: his own experience of social and personal life. Again and again he is asked to talk about his life as a lawyer by comparing it with his life as a person, to connect what he is doing with what he knows.¹⁰

Appearances, then, can be deceptive, at least when 'activities' is not one's vocabulary of integration (*Activity). In digging beneath appearances and in running new orders through chaos, we may come to appreciate person's 'eccentric diversity' may be another person's plausible unity. Attending to one's 'own experience can help' here. In the process of writing autobiographically the student can expect to enter into a process of self-discovery. She may come to sense that side of life which 'may seem' to her to be 'disparate' from another side may be intimately linked.

White's book may be imagined as 'a university bound in a lesser volume', to use the words from Clarendon's *History*.¹¹ White's interest in uniting a great many languages is explicit in prefatory remarks to the abridged edition of *The Legal Imagination*:

[A basic concern] is in the process of integration or composition: the putting together into coherent wholes of what would otherwise be fragmentary or broken. This concern runs through various aspects of life: in the life of the individual, the integration of the private and the professional, of feeling and thinking; in a particular text, the integration of the particular and the general, of unity and contradiction; in the world of culture, the integration of different forms of expression, from poetry to law. (The structure of this book is indeed intended to exemplify one version of this kind of integration: I ask you to read it not as an anthology but as a composition.) The implications of this emphasis are . . . subversive of certain established practices, especially of some academic thought and writing; but . . . , I think, the law can be seen as a method of integration, a way of putting together different voices, different languages, into a single composition; a way of comprehending two opposing sides and what can be said in favor of each.¹²

¹⁰ Ibid.

¹¹ Quoted in *The Legal Imagination* 947.

¹² *The Legal Imagination* (1985) xiv-xv

In the activity of ‘putting together different voices’, we may move from discord to a plausible harmony, at the level of a person and of a society. The ‘coherent wholes’ that White imagines ‘putting together’ are not the kind that are merely the sum of the parts, for such ‘putting together’ would merely be ‘additive constitutionalism’ rather than that which we have called transformative constitutionalism.

* * *

At the level of education, White’s integrative transformative constitutionalism begins in friendship. *The Legal Imagination* is dedicated ‘To My Friend and Teacher Theodore Baird.’ White’s use of the word ‘friend’ here can be connected with his reading of Clarendon’s *History*. White points to this work as a success at making ‘a way of talking’ that ‘unites public and private experience’.¹³ Toward the end of his reading, White says this:

In a startling combination of ideas, the process of government is seen as a process of education. How can this process of education be explained or even identified? Virtues are as numerous as leaves; what is right for one man at one time is wrong later, or for another; and even a sublime virtue alone is not enough in a competitive world dominated by such figures as Cromwell and Hampden. No curriculum for the young man can be recommended, no outline of a good education prepared. The answer Clarendon expresses is not in the content of instruction, but – remarkably – in the nature of the relationship in which the process occurs. The education that is at the center of virtue celebrated by this book is defined as education between friends.¹⁴

White here offers his reader an analogical source for thinking and talking about the nature of the relationship that he creates with her. What kind of teacher is White? We can be sure that he is one who believes that the kind of ‘virtue’ that is of value at the level of education can be transmitted not by explicit instruction but through exemplification.

¹³ *The Legal Imagination* 905.

¹⁴ *Ibid* 922.

As a 'reader' who has struggled for words for thinking and talking about my experience of reading White, I was eager to have more of them for my analogical imagination. There are more at the end of White's reading of Clarendon:

What a view this is for us! The world of morality and public events are one; private and public experience merge; the government is seen to consist of individual men and to operate by their relation. Good government is the sum of all felicity, public and private, the ultimate expression of civilization and of religion. The statesman is the hero of virtue and wisdom. Excellence in public life depends upon excellence in education; and excellence in education is seen as excellence in friendship. Whatever defects Clarendon's *History* may have as scientific history, it succeeds in the central purpose of historical writing: to make another reality, with which we may compare our own, live for us.

What must at last be said is that the most remarkable expression of the ideal of educative friendship is in the writing of the *History*. There are many possible relationships between reader and writer. When one looks at a list of political books and memoirs today, one sees that persuasion, prestige, and money are all involved. When a writer writes to us out of friendship, he is writing from a different world.¹⁵

What a view this is for us! Whatever defects *The Legal Imagination* may have as a law textbook, it has made another 'reality' live for me, and I hope for us. We can be sure that White's book is written to us 'out of friendship'. White's educative friendship is the stimulating conversation that he offers. In this conversation the reader is helped discover her or his own capacities for thought and feeling. *The Legal Imagination* teaches its reader to value himself by attending to her or his own experience, including the disorientating experience that White offers.

* * *

What a reader can get 'out' of an original work is limited to what she or he brings to it. Before reading *The Legal Imagination* a newcomer to White may do well to read Milner's Ball's review of the book. Ball is to be applauded for actively resisting the 'law and literature' label:

¹⁵ Ibid 924-5.

We have been reaching for a book like this, moving toward it by degrees for as long as we have reckoned with the truth that law is neither self-enclosed nor self-sufficient. Thus casebooks have dressed their cases with ever more generous dollops of economic theory and even theology. Law schools have been developing courses like 'Law and Literature' and 'Law and Psychiatry' But *The Legal Imagination* is qualitatively different from such uncertain alliances. There is a lot of literature in this book, but it is not simply a law-and-literature book; it is rather a book about law *as* literature. There is a lot of imagination in this book, but it is not simply a book about law and the imagination; it is rather a book *of* the legal imagination.¹⁶

Ball appreciates that the seemingly innocent word 'and' could be at the heart of a profound misreading and a failure of the imagination. The simple conjunction 'and' can have a problematic disjunctive effect, serving to keep law 'self-enclosed' and 'self-sufficient'. The disjunctive effect may please people who would keep the world simple and tidy, as an imperialist would want, but we can be sure that simplicity and tidiness will not be constitutive of a meaningful unity.

Ball would have little trouble sensing a productive repetition with White's second book, *When Words Lose Their Meaning*, White, to recall, brings together 'a set of texts that range rather widely in both cultural context and generic type.'¹⁷ Given that a 'legal' text first appears in the book in the penultimate chapter, White's reader could understandably be surprised to learn that the book is intended to be 'legal' through and through. White suggests as much in the preface to his book:

Although this book may not appear to be a book about law, I am a lawyer and my intended audience includes lawyers among others. To them in particular I wish to say that this book, despite appearances, is really about law from beginning to end. Indeed, one of its objects, which does not become explicit until the last chapter, is to set forth a rather different conception of law from those that presently prevail in academic circles: as an art essentially literary and rhetorical in nature, a way of establishing meaning and constituting community in language.

I can perhaps make clear something of the nature of my claim by explaining its origins. When I went to law school after doing graduate work in English literature, I found a

¹⁶ M Ball, Review (J B White, *The Legal Imagination*) (1977) 44 *University of Chicago Law Review* 681, 683.

¹⁷ *When Words Lose Their Meaning* ix.

continuity in my work that I had not expected. The enterprises of law and literature are in obvious ways very different, but I was still reading and writing, after all—still trying to make sense of what other people said and to speak intelligibly myself, still trying to understand claims of meaning made against a background of tradition and the tests of experience. Indeed, in its hunger to connect the general and the particular in its metaphorical movements, and in its constant and forced recognition of the limits of mind and language, the law seemed to me to be a kind of poetry.

I continued to read literary texts, not because they met an aesthetic need unsatisfied by the law but because I could not do as I wished without the kind of education these texts continually offered and demanded. And I found the converse to be true as well: my literary reading was continually informed by my experience of law, by watching people struggle with language and fact and experience as they tried to make a language of meaning adequate to their needs, and by the exasperations and clarifications I myself experienced in using both legal and other languages to make claims of meaning and to establish relations with others. For me the activities of law and literature, usually thought of as separate, were in a deep sense the same thing, and I could not do one without the other. The study of certain ancient Greek texts has seemed to complete a field of activity for me, in part because such lines as those between law and literature, so sharply drawn in our contemporary academic discourse, are here rather blurry, if they exist at all.¹⁸

A difficult problem White faced in talking about his ‘experience of law’ is that he had no readily available terminology that facilitates the imagining of ‘law’ and ‘literature’ as ‘the same thing’. Working against White is not only the terminology but the predominant image of language, a mechanistic image in which words are tools for pointing to static objects outside of themselves. White lives by an organic image of language, in which language is an evolving, inherited cultural artifact for constituting and reconstituting our relations with each other. This image emerges from sensitivity to the inadequacy of all language use, a sensitivity that is of direct concern to White’s interest and engagement in the activity of ‘composition’, in and out of the law.

* * *

¹⁸ Ibid xi-xii.

Shall we compare White's *When Words Lose Their Meaning* to . . . ? That is a question Peter Teachout asks in a review of White's book. His analogical reasoning has much to suggest about the theme of unity:

Each chapter of his book forms a separate self-contained essay on a particular classic text, and in each essay White pursues the central question: what possibilities are represented here for transforming or revitalizing inherited culture through the imaginative reconstitution of its rhetorical resources? By taking this approach White is able to show us the individual imagination at work in a wide variety of contexts, first criticizing the existing culture and its language and exposing its inadequacies, and then forging out of those inherited materials a new cultural language which offers restored or enriched possibilities for the realization of self and community. . . .

However, to see White's book simply as a series of discrete, self-contained essays is to ignore its most impressive aspect. For *When Words Lose Their Meaning* is a remarkable composition in its own right, with its own complex pattern and movement, its own deep integrity. The fact is that White's reading of each classic text is informed by his reading of all the others – and self-consciously so. As a consequence, there is a certain cumulative perspective at work at any particular point in the book that one cannot fully appreciate until one has read the entire work through. It is as if White has woven eight separate tapestries out of the same basic material, in each case the woof strand being supplied by the text immediately at hand with the weft strands supplied by those classic texts dealt with in the other chapters. Or perhaps it is like eight windows, or doorways, opening into the same large room. There is a kind of integrity to the whole that would be missed entirely by viewing each chapter as involving simply the discrete critical treatment of a particular text.

But even this imagery fails to suggest the basic structure of White's work, which is in some respects like that of a picaresque novel. Our central experience here consists of a series of encounters with distinct worlds – here represented by particular classic texts – out of which a complex and coherent ethical vision gradually emerges. Each world stands for a particular community of traditions and values and aspirations – for a particular way of dealing with experience, of making sense out of it. Each offers us an important education and, more than that, the possibility of real friendship and community. But there is a sense in which none of these communities can be a final resting point, for it is an essential part of the character of the picaresque hero that he resist the stasis of ultimate embrace by any particular community. A very important aspect of this education is learning to make his own way. His predicament . . . is how to have 'an independent fate, and love too'. But if this is a

predicament, it is also a challenge, and one addresses directly by White in this book: how to have a world in which genuine community is not only possible but central, in which one's commitments can be deep and lasting, and yet in which possibilities for the development of self and community are not closed in by system but ultimately characterized by a certain poetic open-endedness.¹⁹

The 'cumulative perspective' that the highly attuned Teachout talks about here is related to the phenomenon of echoing between texts (*Attunement). In composing *When Words Lose Their Meaning* White has offered his reader some repeated patterns that powerfully challenge mechanistic imagery of a unitary reader extracting from a text self-contained bits of 'meaning'. With one of White's texts being Chief Justice Marshall's opinion in *McCulloch v Maryland*, the lawyer is given the opportunity to experience the transgressing of disciplinary boundaries, law and literature. The metaphor of transgressing, however, is inapt, for to talk of transgressing boundaries presupposes that boundaries exist in the first place. White's act of reconstituting his inherited language through the composition of his book may well leave his reader in doubt whether such boundaries 'exist', save in the delusive imagination. White identifies, for example, Chief Justice Marshall and Burke and Homer as doing the same activity, namely the kind of composition White is doing. What White is doing arguably is, and is not, law; and it is, and is not literature. The familiar has become strange, the strange familiar. Words have lost their ordinary meaning. The whole and the parts are falling apart, and we are left to try and recompose our languages and ourselves, to run new orders through multiplicity.

* * *

In the first chapter of *Justice as Translation*, White speaks at length about what he calls 'intellectual integration.'²⁰ Here is an opening fragment:

In this chapter . . . I ask what it might mean to integrate—to put together in a complex whole—aspects of our culture, or of the world, that seem to us disparate or unconnected; and what it might mean in so doing to integrate—to bring together in interactive life—aspects of

¹⁹ P R Teachout, 'Worlds Beyond Theory: Toward the Expression of an Integrative ethic for Self and Culture (1985) 83 *Michigan Law Review* 849, 853-55 (footnote omitted).

²⁰ *Justice as Translation* 3-21.

our own minds and beings that we normally commonly separate or divide from each other. I want to think of integration, that is—and its opposite, disintegration—as taking place on two planes of existence at once, the cultural and the individual. . . . To speak of ‘integration’ may be a bit misleading, for this term may be thought to imply an ideal of perfect unity or coherence, a reduction to a dominant scheme or a single language in which every part has its proper and defined place. But I mean to use the term rather differently, to include a tolerance for, indeed a clarification of, diversity and difference. To put what I shall say in summary and somewhat Delphic form, what I mean by integration is a kind of composition, and in a literal, and literary, sense: a putting together of two things to make out of them a third, a new whole, with meaning of its own. In this process the elements combined do not lose their identities but retain them, often in clarified form; yet each comes to mean something different as well, when it is seen in relation to the other. In this sense the element is transformed, as it becomes part of something else, an entity existing at a new level of complexity. At the same time we ourselves are transformed as well, both as makers of the new object in the world and as those who engage with it.²¹

This sense of ‘integration’ will be familiar to readers of White’s earlier books. As he goes on to point out, for the purpose of placing his book in relation to his other work, his ‘aim in [*The Legal Imagination*] was . . . to try to transform our sense of law by putting it together with something else: to try to see it as a compositional art, as a set of activities by which minds use language to make meaning and establish relations with others.’²² And his aim in *When Words Lose Their Meaning* was to ‘transform . . . our sense of . . . literature . . . when we put it together with the law.’²³ This transformative approach to ‘integration’ is a long way from a theoretical approach, in the sense of seeking ‘a dominant scheme or a single language in which every part has its proper and defined place’. The two different senses of ‘integration’ are intimately associated with nothing less than two different constitutive metaphors for binding together the world (*Metaphor): the organism and the machine. White promotes the first in the process of challenging the second.

The central part of *Justice as Translation* engages in judicial criticism. As with earlier work, White’s aim is to identify the ideal possibilities in the judicial opinion so that they can serve as a ground for criticism, in the pursuit of justice. White’s criticism of

²¹ Ibid 3-4.

²² Ibid 17.

Justice Story's opinion the *Prigg* case arguably is the heart of his book (*Attention). Story's monological opinion can be read as a grand failure of the legal imagination when considered against the 'ideal possibilities'. For White, this failure, in which Margaret Morgan's voice was silenced, is the material of injustice.

White places a certain 'openness' high among 'the virtues of good judicial writing'.²⁴ The kind he seeks to define and celebrate can be readily connected with several of his key words, including 'equality'. Consider, for example, the following passage:

A common view of the judicial opinion is that it is a kind of brief, a mobilization of all the arguments that can colorably be made on behalf of the result chosen, with somewhat less superficial acknowledgment of what can be said on the other side than one finds in a lawyer's brief. But it might be thought that the task of the judge in writing an opinion is to expose to the reader the grounds upon which her judgment actually rests, with as full and fair a statement of her doubts and uncertainties as she can manage. Such an opinion would establish a relation of fundamental equality with the reader, who might follow the whole argument, consider himself enlightened by it, but come to the opposite conclusion. I think no Justice has consistently written out of such an understanding; Harlan comes closest, but one can see instances of such authenticity of mind in the work of others as well, including Holmes, Jackson, Black, and Douglas.

This kind of openness, if it could be achieved, would not only establish an admirable relation with the reader, it would enact an important intellectual virtue, perhaps the central virtue for the lawyer, namely, the suspension of judgment. If the lawyer knows anything at all, he knows that when he has heard one party's story he has heard only half the case; that when he feels a reaction or response leading him one way, it is likely to be matched by one tugging in the opposite direction as well; and that the art of law is not that of linear reasoning to a secure conclusion, but an art, fundamentally literary and rhetorical in kind, of comprehension and integration: the art of creating a text—a mind and a community—which can comprise two things at once, and two things pulling in different directions. In speaking for one side as a lawyer, or for one result as a judge, that is, the legal mind should recognize (implicitly in the lawyer's case, explicitly in the judge's) what can be said for the other, thus by an art of integration creating a world in which differences can coexist.²⁵

²³ Ibid 18.

²⁴ Ibid 224.

²⁵ Ibid 224-25.

That passage resides at the end of White's engagement with a series of judicial opinions, including Justice Harlan's opinion in *United States v White*.²⁶ The passage can serve as a resource for thinking and talking about the virtues of good judicial criticism. The task of the judicial critic is to expose to the reader the grounds upon which her judgment actually rests, with as full and fair a statement of his doubts and uncertainties as he can manage. By my reading of his judicial criticism, White practices the 'openness' that he preaches.

Some White critics have expressed different opinion. For example, in *Translation as Argument* (1990), a review of *Justice as Translation*, Mark Tushnet has this to say:

James Boyd White has pulled off a major accomplishment: he made me want to write a defense of Richard Posner in the most occluded and bureaucratic prose possible. My desire results in part from some obvious defects in White's arguments . . . and in more substantial part from the manner in which White presents his arguments. . . .

. . . [T]he choice seems clear. Authoritarian voices are bad; imaginative self-assertion respectful of the voices of others is good. Yet, this sort of opposition has a certain 'new age'-ish mushiness that provokes some cranky observations. First, White trades on . . . images of African-Americans and women as excluded outsiders whose voices need to be heard. His formulations, though, seem to ask 'us' to be open to everyone. Frankly, that strikes me as ridiculous. 'We' may not have learned much about right and wrong over the course of history, but we know enough to realize that we do not have to be open to the voices of racists. The idea that we should be open to previously excluded voices, in contrast, relies on a substantive theory of justice regarding the impropriety of past exclusion of certain voices. White's approach lacks substantive content.

Second, read closely, White himself is not completely open to alternate voices. He systematically downplays the claims made on behalf of 'law-and-order' . . . This . . . suggests that White's openness is only partial, and that his partiality has some, dare I call it political, content. The first aspect of White's imagined reader, thus, is a political one: someone who is basically sympathetic to the reforms of constitutional criminal procedure instituted by the Warren Court and basically not terribly sensitive to the real problems of maintaining order in a disorderly society. . . .

²⁶ 401 US 745 (1971).

If White is not truly open to a fairly large number of voices, how can he present himself as the apostle of openness?²⁷

There is much to be said for resisting the 'opposition' of 'authoritarian' versus 'imaginative self-assertion respectful of the voices of others'. Yet I am not sure that White created the opposition in the first place. As such, the 'cranky observations' may be misdirected. Tushnet arguably should be criticized for not applying his knowledge about the limits of simple oppositions to his own, namely open versus closed. In a word, Tushnet's composition lacks integration.

In an effort to enrich the open-closed opposition, Walter Ong, in *Interfaces of the Word* (1977) writes:

Openness does not mean lack of organization, lack of principle, or lack of all resistance. For the human being at least, it means quite the contrary: the strengthening of organization, principles, and resistance where needed, so that interaction with the outside can be strong and real. Indeed, paradoxically again, openness means strengthening closure itself. Ultimately, openness calls for strengthening of closure because of the dialectical relationship of the two in consciousness. When one is heightened in a way, the other normally undergoes heightening in another way.²⁸

The word 'integrity' comes to mind, one usage of which concerns the extent to which the various commitments of a person can be managed to form a harmonious, intact whole. The word 'harmonious' here does not necessarily require the absence of tensions and contradictions. Indeed tensions and contradictions may be a requirement for stability, such as in the case of an ecological system. The same could be said for a legal system and for a person. Tushnet failed to suggest this line of inquiry.

In *Conversing About Justice* (1991), another review of *Justice as Translation*, Sanford Levinson claimed that White's book lacked an 'integrative' ethic:

Almost totally absent from *Justice as Translation* is the sensibility associated for many of us with the late Robert Cover, whose eloquent insight into the violence that underlies much (I don't think Cover was so pessimistic as to believe all) law stands, if not as a reproach, then

²⁷ M V Tushnet, 'Translation as Argument' (1990) 32 *William and Mary Law Review* 105, 105-7, 109, 112.

²⁸ W J Ong, *Interfaces of the Word: Studies in the Evolution of Consciousness and Culture* (1977) 340.

certainly as a challenge to White's work. In stunning contrast to White's image of the judge as grand integrator is Cover's as the killer, sometimes quite literal, as in the case of capital punishment . . . To be sure, White recognizes that '[t]he law works by an act of coercion,' but this acknowledgement is immediately undercut by his seeming confidence that law works (or at least should work) to 'create something new, a place and a mode of discourse, a set of relations, that form a central part of our civilization.' He continues, '[A]t its best [such coercion] can work as a way of respecting the human beings on both sides of a controversy by giving each something to say that is appropriate to their legitimate needs and to the character of the relation that exists between them.' Only an absolute churl would fail to find this vision of law, 'at its best,' attractive. But dare one say that it appears almost pollyannaish when placed against the reality not only of secession, chattel slavery, and civil war, but even against the more mundane problems of our contemporary life, including, say, abortion? . . . [T]here may simply be no way to 'integrate' the dazzlingly different perspectives of the 'pro-choice' and 'pro-life' adversaries in the abortion debate.²⁹

If '[o]nly an absolute churl would fail to find this vision of law, "at its best," attractive', then will say that I am such a churl. However, it seems to me that Levinson is committed to some false oppositions. Is 'White's image of the judge as a grand integrator' really a 'stunning contrast' to Cover's image? Cover draws attention to the 'reality' of violence existing in the law and to the 'reality' of the masking of such violence. White does not deny or downplay this reality but suggests that it should not be overstated.³⁰ Cover's image is not necessarily a rival to White's image, at least going by my image of the two images, which may well be different from your image of the two images (*Image).

²⁹ S Levinson, 'Conversing About Justice' (1991) 100 *Yale Law Journal* 1855, 1864-65 (paragraph space and footnotes omitted).

³⁰ On Cover's attention to 'the element of violence in the law, White, in *From Expectation to Experience*, says: 'This is an appropriate point, but I think it is often greatly exaggerated' (172). He goes on to say:

The paradigmatic legal event is not really the sheriff hauling someone away in chains, but two parties hammering out an agreement, usually one that meets all the desires of neither party, under pressure of adjudication; or an adjudication with the results of which both sides willingly, though sometimes unhappily, agree to abide. Our law works by agreement much more than it does by force. And when it does work by force, it seems to me a misnomer to speak of that as violence, at least in many cases; there is a large difference, to me, between a sheriff executing a judgment or a court ordering someone into jail for contempt, and what I think of as true violence, as exemplified by the behavior of mobs or criminal gangs or, often, victorious armies. The distinction between force and violence seems to me an important intellectual and ethical resource, and I would resist blurring it.

In response to that passage I can readily imagine a number people who have much to say about the oppression of indigenous peoples – Vine Deloria, Clifford Lytle, Moana Jackson, Ani Mikaere, among

Levinson position reminds me of a story that is said to have taken place in Poland. One day a husband and wife who were in dispute over a marital problem visited the town Rabbi. In accordance with tradition, the Rabbi was to hear both sides of the argument and then decide who was right. He first heard the husband's side of the story and, when he was finished, the Rabbi said to him: 'You are right.' Then he heard the wife's side of the story, to which he said, 'You are right.' When they both left the Rabbi's eavesdropping wife asked him, 'How could they both be right?' The Rabbi answered: 'You are right.'³¹

If we sought such a Rabbi in relation to White and Cover we would struggle to do better than Lewis LaRue, who, in 1986, heard these two among others speak on the topic 'The Constitution and Human Values'. Their stated agenda was to consider the way in which constitutional law is 'a branch of the humanities'. In this spirit, LaRue, who was invited to comment on the speakers, adopted a literary metaphor to characterize his role, namely the Greek chorus. Let him speak:

The action of the drama takes place in the agora, but over the edge, out of the mainstream of activity. Two of our most famous rhetors have come down from the courts (located somewhere, I think, up next to the Acropolis), and are engaged in a debate about what they have seen. Professor White tells us that he has seen something that is like unto poetry; he has seen people who are in the business of reading old texts and writing new ones. He speaks to us about the secrets of reading and writing; he would have us write poems of our own. Professor Cover says he has seen these people and he denies that they are poets; he says that they are men and women who are inflicting pain and suffering upon others. He speaks to us about the structural bond of word, deed, and office; he says we must prepare for resistance. What is the chorus to say?

If you have studied Greek drama, you may have noticed that the chorus often vacillates, siding now with one protagonist, now with the other. I am able to fulfill that role. Like White, my education centered around certain key texts of our literature, which we offered to me as central points of value. I was taught to read them in the way White reads them, to see in them certain standards of excellence against which to measure the world. Most of all, I was, like White, educated into a paradox, the paradox that this aristocracy of texts was to be

others – resisting White and applauding Cover. But there is a place for both White and Cover in an integrative story.

³¹ In retelling this story I have drawn from M Rokeach, *The Open and Closed Mind: Investigations into the Nature of Belief Systems and Personality Systems* (1960) 3.

united with a democracy among humans. These loyalties are not abstract, but are woven into my life, in ways I cannot fully describe. Consequently, as White speaks, I assent.

So also, when Cover speaks, I assent. Cover speaks of the terrain of the law as a battleground; he emphasizes the connection of law with violence. I assent because there is another group of texts that have moved me, the bleak texts of Thucydides, Hobbes, Clausewitz and Marx, which are full of dark visions, irony, denunciation, and scorn. My thoughts do not rest on the comfortable support of abstraction, but on an important part of my life. I grew up in a company town where everyone worked for the coal mines. I lived in a small part of the valley known as 'office bottom,' where the white collar offices were located and where management lived. I learned to walk to school, go on to the playground, and there negotiate my own personal peace with those whose fathers were miners, not management. So I am moved by Cover's words.

All of this may explain my own personal vacillation, and account for why this particular chorus, like the archetypal chorus, is inclined toward instability in judgment. It does not, however, aid the audience. The chorus should say things that lead toward a new plateau, make judgments that the audience can use to make further judgments. So I shall make my own judgments, weighing what the rhetors have said.

I will begin abstractly by posing a question: are White and Cover necessarily contradictory or opposed? I think not. Granting that the law is a battlefield, it does not follow that judges are not poets. At the worst, it follows only that judges are regimental poets, poets laureate of power. . . .

It should be clear from White's performance that to read law as literature is not the same thing as to read law with approval, and so his technique of reading is not necessarily inconsistent with Cover's call for resistance.³²

LaRue's here seems to fit 'White's image of the judge as grand integrator', to use Levinson's language. Like White's ideal judge, LaRue speaks in a rich, dialogical way, not in a voice that is merely bureaucratic and official. He has struggled toward the comprehension of contraries. He has put together two stories to make out of them a third story, a new 'whole', with a meaning of its own. In this process the 'parts' combined have not lost their identities but retained them; yet each has come to mean something different as well, when it is heard in relation to the other. In this sense each 'part' has been transformed, as it has been 'integrated' into the 'whole'. I suggest that

³² L H LaRue, 'What is the Text in Constitutional Law: Does it Include Thoreau?' (1986) 20 *Georgia Law Review* 1137, 1137-1143.

LaRue is just the person to challenge Levinson's claim that 'there may simply be no way to "integrate" the dazzlingly different perspectives of the "pro-choice" and "pro-life" adversaries in the abortion debate'. (Susan Heinzelman echoed Levinson's claim in her review of *Justice as Translation*.³³) Read against LaRue's wise and judicious opinion, Levinson's comments on White's 'integration' seem to me to express a failure of the imagination resembling Justice Story's performance in the *Prigg* case.

* * *

In 1995, the *Yale Law Journal* published an extraordinary essay, *Speaking Truth to Power*, by Herbert Eastman, director of clinical education at Saint Louis University School of Law. The essay is extraordinary in that it brings the voices of some former and present clients into the academy. Let us listen to the opening paragraphs of Eastman's essay:

I once had a client named Hattie Kendrick. She was a woman and an African-American, a school teacher and a civil rights warrior, spit upon, arrested, and tossed out of restaurants and clothing stores that did not 'cater to the colored trade.' She marched and spoke out for integration and against oppression. Her school fired her, but not before she had taught generations of black children in Cairo, Illinois, that participation in American democracy was their right and their duty. In the 1940's, she sued to win equal pay for black teachers, with Thurgood Marshall as her lawyer. And in the 1970's, she was a named plaintiff in a class action asserting the voting rights of black citizens in Cairo against a city electoral system rigged to reduce the value of their votes to nothingness. All she wanted was to cast a meaningful vote in a democratic election before she died – she was in her nineties, growing blind and weak. Such a woman. Such a story. And such a voice. Listen to how she discerns the problems of her town: 'Too long have the two races stood grinning in each other's faces, while they carry the fires of resentment and hate in their hearts, and with their hands hid behind their backs they carry the unsheathed sword.' Yet here is how the complaint filed in federal court identifies the named plaintiffs, including Hattie Kendrick: 'All plaintiffs are Blacks, citizens of the United States and of the State of Illinois, and residents of Cairo, Illinois registered to vote in Municipal Elections conducted in Cairo.'

This Article springs from the recurring disappointment and frustration I have felt after consultation with clients in cases presenting outrages that, in a phrase loved by my mother,

³³ Heinzelman's review is discussed above -- *Image. Her remarks about abortion are in her review at 286.

cried out to heaven. I have represented and continue to represent these clients in civil rights cases, broadly defined. These are my clients: a young woman, sexually abused as a child, forced to undergo unjustified strip searches that aroused the nightmares of her childhood. A black laborer finding his lunch in the toilet and racist threats in his locker. A gay man staring death from AIDS in the face and denied the only available treatment because of bureaucratic indifference and homophobia. A recovering drug addict holding his addiction at bay with the support of a group home, yet in jeopardy of losing that home when fearful neighbors complained to a cowardly city government.

My frustration and disappointment began when I reviewed the pleadings I drafted for them. I could barely see over the chasm separating what those clients told me about their lives and what I wrote to the court as factual allegations in the complaint – sterile recitations of dates and events that lost so much in the translation. What is lost in a description that identifies a woman like Hattie only as a registered voter? Details, of course. Passion, certainly, but more than that. We lose the identity of the person harmed, the story of her life. But even more is lost. This was a class action aimed at remedying a systemic problem harming thousands, over generations. The complaint omits the social chemistry underneath the events normally invisible to the law – events that create the injury or compound it. In this complaint, we lose the fullness of the harm done, the scale of the deprivations, the humiliation of the plaintiff class members, the damage to greater society, the significance of it all.

The complaint omits the frustration of the democratic process and the powerful metaphors that claim an exception to the rules restricting the court's involvement. The complaint leaves intact the walls between the clients and the court, the clients and the lawyer. In a strange way, it even effaces the lawyer by denying her the dynamic and creative role of responding to the tragedy witnessed.

I wondered how we, as lawyers, could plead the horror of wrong done on a mass scale. In reviewing the pleadings in other famous civil rights class actions, I found similar things. This Article explores why we fail and wonders whether we can do better.

To begin with, this Article demonstrates our failure by comparing lawyers pleadings with the reality of clients' situations as described by journalists and historians. Much is lost by words alone, by the words of journalists and historians no less than those of lawyers. But with their losses and omissions, these contrasting descriptions will prove useful in my analysis. . . . In this Article, we . . . read the work of a lawyer speaking through a complaint to a judge who will then, as part of an interpretive process, engage the lawyer in an ongoing conversation that is begun and framed by the complaint. . . . The very high social stakes and moral imperative of civil rights cases invite literary treatment, in order to present world in

conflict. In a systemic civil rights lawsuit brought by a class against a governmental or corporate system, the surface of everydayness is ripped open and we inspect the lawyers underneath. We then find the routine that grinds along, churning out the little injustices, the grinning faces that conceal resentment. The civil rights plaintiff may stand in the courtroom as an equal to her adversary, but she did not enter the courtroom in that condition and may leave with that inequality deepened. An adverse verdict can mean continued oppression, even death.³⁴

Readers familiar with White's work may well have heard echoes of him in that passage, especially the remark about the 'sterile recitations . . . that lost so much in the translation'. (I have omitted several footnotes which direct the reader to three of his books, namely *The Legal Imagination*, *When Words Lose Their Meaning*, and *Justice as Translation*.) White's more attuned readers, such as LaRue, will be well equipped to compare Hattie Kendrick with Margaret Morgan at the level of being silenced and erased by 'the law', in the service not of 'integration' but of 'oppression'. Like White, Eastman is concerned with possibilities, or 'whether we can do better'.

Throughout the remainder of his 100-page essay, Eastman 'integrates' his clients' voices with White's, one aim of which is to give new life to the word 'integration' à la White. Here is one fragment:

Litigators' language surrenders the most power of all. This happens, in part, because of what White calls the 'thinness' of [the] speech of concepts, of propositional, adversarial speech. In our rush to counter the reality we anticipate from the adverse party, pleadings lose the depth of reality experienced by our clients. . . .

We now find ourselves entering the era of plain writing. . . . If plain means unadorned, then plain writing is artless. The art of lawyering demands more. . . . While no one need defend the virtue of abandoning nineteenth-century legalese, it does not follow that plain writing is anything more than the twentieth century's version of legalese, greatly improved but still improvable. More literary devices may creep into our practice, as I propose here. . . . At the outset, we can borrow the voices of Wicker the journalist and Rothman the historian. Here we consider the grafting of two voices into one medium – journalism or history, and law. This combination is similar to the technique of 'dramedy,' a term invented by the television industry to refer to programs, such as *Hill Street Blues*, that portray serious

³⁴ H A Eastman, 'Speaking Truth to Power: The Language of Civil Rights Litigators' (1995) 104 *Yale Law*

subjects in a story that alternates between high comedy and dark tragedy. . . . Or we could borrow the term 'ambiguity' from James Boyd White and use it in the same sense as he does . . . - mixing different kinds of language so that the reader is asked to sustain a tension between them, to find the meaning of the words somewhere between the languages, or above them, through some integration. As White demonstrates in *Justice as Translation*, the power of the poem derives from difference, the tension between the sound of the words as they would be spoken in ordinary conversation or prose, and the meter and rhythm of poetry. The stirring of two opposed ways of speaking creates a third way with its own beauty, meaning, and force. . . . As a lawyer, I could have achieved this integration by including Hattie Kendrick's voice in the Cairo complaint. . . . White . . . hopes that, with stories, we could reach even a Chief Justice Taney and reverse the process by which 'Dredd Scott is converted before our eyes from a person into an object.' . . . The complaint in the Cairo case could have gained persuasive power by telling the story of how Cairo's African-American citizens had themselves struggled for equal rights and faced despair, how the white majority's violent determination to maintain a segregated roller rink transformed a boy into a seemingly militant leader whom the city fathers would then malign. It could have told the reader how Hattie Kendrick lost her career as a teacher as the price paid by one who would not surrender her rights. . . .

At the end of it all, the court and the lawyer will reduce the narrative through the legal process, ending in a decision by the judge. . . . In the context of civil rights litigation, this reduction creates danger given the plenitude of petrifying legal labels and paste-on fact patterns, what White likes to call 'clichés.' So, the Cairo history of racial strife and struggle becomes another 'civil rights case' and Attica's recapture, 'cruel and unusual punishment,' or worse, 'another prisoner case.'

To combat the deadening effects of clichés, one might try metaphors, recasting the complex facts into a few words that quicken those facts with a new meaning, free of the dangerous cliché. . . .

Deconstructionists have observed that we often say much more than we mean . . . White thinks it possible to harness the power of these unintended meanings. . . .

White's ambition for the lawyer is that she write in a way that integrates the segmented parts of the world and of ourselves. . . . Is it good for us to find in our pleadings a place for the expression of our own voice? If a lawyer is well regarded, her voice can be persuasive, as both Aristotle and the Supreme Court acknowledge. . . .

We would suspect that there is a . . . way, as White hopes, to live our lives and practice our profession in a fuller sense, as both 'performers' and 'characters' and, simply, as people.

When I sat down to redraft the original Kendrick complaint, I was three years out of law school. . . . I found little reason to alter the complaint other than adding . . . Preston Ewing as a class representative. . . . Hattie read it over quickly, trusting my judgment in such matters. Preston scrutinized it more carefully, but said nothing.

Only years later, as I started to work on this Article and discussed the complaint with him, did Preston say to me, 'I always wondered why you lawyers write about Cairo the way you did.' Rummaging through my file of Cairo memorabilia after that conversation, I rediscovered a newspaper article quoting me on Cairo . . . Preston's remark echoed . . . I looked once more at the pleading. Where in all this were Hattie and Preston? Where was I? Could I have written it differently?

James Boyd White asks the same question: 'Can we find ways to talk that will reflect more fully what we actually know to be true of ourselves and our minds, of our languages and our cultures?' . . . I think so. We can write the pleading as a story, the story as an argument for change.

That is no small trick. This means writing while astride a canyon, one foot on each side, over the great distance between the civil rights client and the court, between 'us' and 'them,' stretching ourselves between the languages of the client, of other observers of reality, and our profession. . . .

White's characterization of lawyers as novelists and his admonition to 'hold in the mind at once' two conflicting voices conjure the ghost of one of our greatest novelists, F. Scott Fitzgerald. . . . [T]he lawyer as novelist may emulate Fitzgerald's wider posture toward life. Fitzgerald's insight serves as a wise counsel to the civil rights litigator who would speak truth to power: '[T]he test of a first rate-intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function. One should, for example, be able to see that things are hopeless and yet be determined to make them otherwise.'³⁵

Eastman's essay echoes White's work in that it is full of life. He never falls into 'the language of concepts' that he criticizes. In this regard he offers what White would call a 'literary' piece of work (*Voice). He echoes White's efforts to identify the ways in which languages differ from one another, and differ beyond the capacities of the best translator to bridge them. Eastman should be applauded for giving attention to the experience and art of the lawyer, attention that is commonly lacking in law journals

and books. As White said on an essay by Eastman's friend Clark Cunningham, '[h]e speaks to us as fellow-lawyers, . . . as people whose lives are shaped by the process of lawyering. This is a most welcome change.'³⁶ Why? 'There are many . . . who tell us what rules we should make or follow, but all too few who speak well about the meaning and quality of the practices of mind that define our professional lives.'³⁷ I especially like the way Eastman critically engages with his former self: the language he used largely without question, language that did justice to no one, including himself; and the stories that he failed to tell, stories that had the potential to transform us all for the better. In this regard, in his essay, we can hear Eastman listening to his own echo and engaging in self-criticism, with the hope of improving his own voice. What would become of the law if more lawyers did this and made compositions about it? I suggest that the sound of 'the law' would begin to change. Eastman's description of Hattie Kenrick, namely 'such a voice', could readily be applied himself.³⁸ His work in the echo of White's work is a great step toward a vibrant polyphonic law; it is a definition through performance of *integration*.

* * *

White's *Acts of Hope* explores the way authority is thought about and constituted in a series of texts, including William Shakespeare's *Richard II*, Austen's *Mansfield Park*, Nelson Mandela's speech in the Rivonia Trial, Emily Dickinson's poems, among others. At the end of his book, White has this to say about the connections:

In this book I have tried to define a position from which these texts, highly diverse as they are both in generic type and in cultural context, can be seen to address a common problem, that of managing the relation between the self and the authorities of the world. The suggestion that one could in this way read together Mandela and Dickinson, Plato and Shakespeare, not because they expressed similar ideas but because they are engaged in different versions of the same activity, may have at the beginning of this book been surprising; but I hope it is no longer. Indeed, if this book has done its work, the reader will think, as I do, that all texts can be seen to address this issue, for every text uses language, and

³⁵ Ibid 800, 808-15, 827, 829, 852, 861-64 (footnotes omitted).

³⁶ J B White, 'Translation as a Mode of Thought' (1992) 77 *Cornell Law Review* 1388, 1391.

³⁷ Ibid.

language—as Dickinson especially teaches us—is a system of authority. To look for features of life so widely shared is a way of looking for a way to unite what are in our world separate existences and forms—poetry and law, the private and the public, the past and the present, English and Greek—and in doing so to define an activity of mind and imagination as a ground of human life.³⁹

If this Thesis has done its work, the reader will not be surprised by White's claim 'to unite what are in our world separate existences and forms'. Instead, there will be repetition and increasing familiarity, hopefully of a productive sort.

A reader of Posner's revised and enlarged edition of *Law and Literature* (1998) has the opportunity to see if White's book has 'done its work'. Posner has to say about it:

[L]et us consider how [White] fits [Austen's] 'dark' novel, *Mansfield Park*, into the law and literature canon. Fanny Price, a poor young girl, is taken into the home of wealthy and aristocratic relatives to be brought up properly but also to be patronized and even abused, Cinderella-fashion. At first she accepts and indeed internalizes the false values of her grand relatives. But gradually she sees through them, and she is rewarded at the end of the novel with marriage to the most decent – and through contact with her much improved – member of the family. The point interestingly emphasized by White is that Fanny is handicapped both by being poor and oppressed and as a result deficient in self-esteem and a sense of autonomy and by having to think as well as speak in the vocabulary of her upper-crust relatives – she has no other vocabulary. It is a vocabulary that, Newspeak-fashion, inverts the proper sense of words, substituting good manners for good morals. These circumstances delay Fanny's rejection of the false values of her grand relatives. Although White does not quite say this, he seems to view *Mansfield Park* as an allegory of the process by which an oppressed minority struggles for emancipation. Central to that process, in White's view, is the minority's achieving enough fluency in the language that the majority has imposed upon it to turn that language right side up so that it will express the minority's needs and aspirations. Language is both the prison and the key to the prison.

There is a strong didactic element in Jane Austen's novels, and as I do not question the validity of White's interpretation, it may be parochial of me to complain that he has escaped law's gravitational pull. Lawyers must learn to master language lest they be mastered by it, but to use Jane Austen as the vehicle for imparting this lesson is as strained as using the

³⁸ For some comments on Eastman's voice, see C D Cunningham, 'Hearing Voices: Why the Academy Needs Clinical Scholarship' (1998) 76 *Washington University Law Quarterly* 85, 95.

poetry of Wallace Stevens to rebuke jurisprudential extremes. White . . . loves literature and knows law wants very much to yoke them; but they can be an unruly team.⁴⁰

Ask a problematic question, get a problematic answer. We might wonder why Posner wants to know 'how' White 'fits' Austen's novel 'into the law and literature canon'. Is it because he seeks to fit White into the tidy categories that are safely parted with the conjunction 'and'. Posner's reader is invited into Posner's 'home' of distinct objects. (What is 'law' if it has 'gravitational pull'?) What will become of her if she 'accepts' and 'internalizes' his 'values' without question? Is it possible that Posner's language is a 'prison'? If so, how might we master it lest we be mastered by it? Might we do well to question the validity of Posner's interpretation of White's interpretation of *Mansfield Park*? After all, Posner says nothing about the place of White's reading of *Mansfield Park* in the rest of *Acts of Hope*. Why the silence about part-whole relations, which are obviously so vitally important to White? Posner fails to do justice to White's reading of *Mansfield Park*.

³⁹ *Acts of Hope* 303.

⁴⁰ R Posner, *Law and Literature: Revised and Enlarged Edition* (1998) 325-36.

Justice

In October 1997, the *Truth and Reconciliation Commission* held its Legal Community Hearings. The Commission gave attention to a number of issues, the first of which was this: 'The relationship between law and justice.'¹ This issue, as David Dyzenhaus remarked in a critique of the Hearings, is part of 'the age-old debate in the philosophy of law between legal positivists and natural law theory.'² The issue is at the heart of much of White's work. My reading of White's engagement with the issue has involved a to-and-fro between his work and my efforts to make some sense of, and participate in, talk in New Zealand and in South Africa about law and justice. A fragment of this to-and-fro is offered in this entry.

* * *

In a section in *The Legal Imagination* on 'the language of race', White reproduces a disturbing excerpt from *A Digest of the Laws of the State of Alabama* (1843) relating to the treatment (or, rather, mistreatment) of slaves. After the excerpt White provides a set of questions, including this one:

[W]hat do you suppose were the effects of slavery upon the ways that judges and lawyers thought, argued, and explained themselves, upon the legal system itself? We are shocked to see the materials of our law – statutes and judicial opinions – put to such uses, yet no doubt contemporaries would have claimed for their legal system (as a whole) many of the same purposes and hopes that you would claim for yours. Is the institution of slavery just an unfortunate imperfection, or does it strike to the heart of what we mean by law? Do our notions of what law is and how it operates express a view of life and man with which slavery is so thoroughly incompatible that its existence would infect and destroy the whole? Is this a way of defining an 'internal morality' of law? See L. Fuller, *The Morality of Law* (1969).³

¹ *Truth and Reconciliation Commission of South Africa Report* (1998; 1999) Vol 4, 94.

² D Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998) 34.

³ *The Legal Imagination* 444-45.

Lon Fuller's work, which stresses the inseparability of law and justice, has some remarkable similarities to White's. Both direct attention to difficulties in talking about their inseparability, given that our language, not the least the conjunction 'and', can readily commit us to believing in their separateness. Is not "law" one thing and "justice" another thing? Well, neither law nor justice is a 'thing'. To do justice to both 'law' and 'justice' we need a literary language, with an emphasis on the verb,⁴ that directs our attention to activities.

Perhaps a good place to begin thinking about the law-justice relation is Fuller's *Reason and Fiat in Case Law* (1946). Here is one fragment:

Men have never been very ready to acknowledge that their thinking contains anything like an unresolved state of tension. They have never been very happy with what Morris Cohen calls 'the principle of polarity,' according to which notions apparently contradictory form indispensable complements for one another. In dealing with the antinomy of reason and fiat, the main effort of the various schools of legal philosophy has been to obliterate one of its branches.

Extremists of the 'law of nature' school have tried to eliminate the branch of fiat by maintaining that the whole of law is, or at least can be, the expression of reason. . . . The opposing school, that of the extreme positivists, is hard at work to cut the fiat branch loose from reason. To convert the whole of law into fiat, it is, of course, necessary to make it the fiat of some person or thing. So we find this school insisting, for example, that custom . . . can never be 'law' until it has been stamped such by the judge, or . . . the sovereign, . . . or whatever standard of authoritativeness the particular faction of the school happens to sponsor. Cardozo revealed his attitude toward this school when he said, concerning the controversy whether moral precepts can be 'law' before they have been acted on by a court: 'Such verbal disputes do not greatly interest me.'

When we deal with law, not in terms of definitions and authoritative sources, but in terms of problems and functions, we inevitably see that it is compounded of reason and fiat, of order discovered and order imposed, and that to eliminate either of these aspects of the law is to denature and falsify it.⁵

⁴ *Justice as Translation* 272 n 4. The pioneering legal economist John Commons took the verb seriously (*Questioning).

⁵ L L Fuller, 'Reason and Fiat in Case Law' (1946) 59 *Harvard Law Review* 376, 381-82.

Fuller's use of the word 'tension' in connection with Cohen's 'polarity' somewhat resembles John Keats's 'negative capability', the capability 'of being in uncertainties, mysteries, doubts, without any irritable reaching after fact and reason'.⁶ In the same spirit, Samuel Coleridge spoke of the capacity of the poetic imagination for effecting a 'reconciliation of opposite or discordant qualities'.⁷ The resemblance here brings us to White: In *The Legal Imagination* Keats's remark on 'negative capability' serves as an epigraph to the final chapter,⁸ whilst Coleridge's remark on the capacity of the poetic imagination serves as an epigraph to the section 'Is the Judge Really a Poet'.⁹ After reading Fuller in the echo of Keats and Coleridge, we may begin to understand why White does not engage in law talk at the level of 'definitions and authoritative sources' in the manner that many legal philosophers do.

Of great assistance to the process of tuning in to Fuller is Peter Teachout's *The Soul of the Fuge* (1986).¹⁰ Here is one fragment:

The most striking feature of Fuller's jurisprudence is the powerful transformation it works in our understanding of the nature of the troublesome antinomies with which legal philosophy has traditionally been concerned. Fuller's thought is a great master solvent of the classical antinomies of jurisprudence: law versus morality, reason versus fiat, formalism versus realism, logic versus policy, justice versus efficiency, substance versus procedure, means versus ends—all of these traditional oppositions are somehow mysteriously dissolved and just as mysteriously recombined in the liberating alchemy of his jurisprudence. This is not, of course, an accidental effect in Fuller's case, but a reflection—indeed, a deliberate consequence—of what he took to be his central jurisprudential task: to free us from the phony oppositions that shackle inherited language and thought.

At the heart of Fuller's endeavor is the attempt to forge out of the inherited materials of our legal culture an ethically integrated approach to language and experience. One can see this integrative impulse at work, for example, in Fuller's insistence that the 'is' and 'ought' of

⁶ J Keats, Letter to George and Thomas Keats, Dec 22, 1817; reprinted in J Keats, *Selected Poetry and Letters* (1969) 308.

⁷ S T Coleridge, *Biographia Literaria* (1817; 1905) 150.

⁸ *The Legal Imagination* 927.

⁹ *Ibid* 762.

¹⁰ P R Teachout, 'The Soul of the Fuge: An Essay on Reading Fuller (1986) 70 *Minnesota Law Review* 1073. The connection just made between Fuller and Keats and Coleridge draws from Teachout's essay (at 1107).

legal rules should be regarded, not as belonging to separate universes of discourse, but rather as aspects of 'an integral reality.'¹¹

Teachout here uses language, especially the word 'mysteriously', that is likely to repel a reader who imagines both natural law as appropriately dead and Fuller as trying to facilitate a resurrection. 'Lon, shouldn't we be leaving "mystery" to the theologians?' It would be unfortunate if his reader is repelled by the language, for the reaction might suggest the presence of cultural prejudices worthy of dislocation. After all, it is such a dislocation that was called for during the apartheid regime. The apartness of the whites and the blacks by means of brutality and cruelty was to a significant extent premised on the apartness of law and justice.

Several of White's efforts in his principal books to address the relation between law and justice are talked about elsewhere in this Thesis (*Equality; Imagination; Integration; Rhetoric). Let us turn to a more recent effort to address the relation. Here is a fragment from an interview published in 2007:

In talking about the law, in this interview and elsewhere, I mean to speak not so much from the outside, as say a political scientist might, but from the inside, as a lawyer. I am not sure that I could devise a general definition of the social phenomenon of law—in fact I rather think I could not—but I do know what it is to teach law, and to learn it, and what I mean by the word *law* is mainly what we teach: a complex inherited language of analysis and argument, which has its origins outside any of us, and a set of intellectual and social practices, again complex, by which that language can be put to use in the world—practices that can be done well or badly, with consequences, small and great. . . .

I am confident that at its best the law we learn and teach is an immensely significant resource both for our society and culture generally, and for those of us lucky enough to live on its terms. It offers a way of approaching a real world problem in terms established by others who have faced similar problems in the past and expressed their views in the authoritative texts of the law, from statutes and regulations to constitutions and judicial opinions. In this sense, it is a way of benefiting from the experience of the past.

But to say that we use a language made by others is not to say that we are governed by a dead hand: as every law student learns, one finds in a very wide range of cases indeed, that arguments—rational, persuasive, decent arguments—can be made on both sides of the

¹¹ Ibid 1078-79 (footnote omitted).

question. The law thus requires real choices from both judges and lawyers, but it informs those choices, which should not be merely a matter of preference or calculation, but should rather express the result of the mind's engagement with the materials of the law—an engagement that holds out the promise, sometimes realized, of a real education for the lawyer, the judge, and the world.

The law in this way creates the space and opportunity for its own change. At its best it makes its changes in response to real conditions and real needs. It is not a model of abstract reasoning, not a theory or an ideology, but a way of living responsibly in the world. It does not collapse into untutored choice, or simple analysis of the costs and benefits one happens to perceive, for it is animated by the fact that its actors are responsible for what they do and must justify their discharge of those responsibilities in the language of the law itself.

These practices have at their center a perhaps somewhat surprising idealism: the statutes and judicial opinions that bear on a case are not read cynically, or reduced to the motives presumed to underlie them, but read as if they were composed by an ideal legislator, an ideal judge, someone who is saying what he means and meaning what he says. The judge is addressed, in the courtroom and in briefs alike, as if he were an ideal judge, and the lawyers too are spoken of with respect, as honorable advocates. This idealism is, of course, in some sense a fiction: neither judge nor lawyer nor legislator is always wise, always honest, always responsible, and sometimes they are the opposite of these things. But it is a positive fiction, creating a pressure on all parties to become and act better than they might otherwise.

There is another kind of idealism in the law, crucial both to its methods of change and to its meaning, that resides in the virtually universal but little noted convention that the lawyer and judge alike must credibly claim that the outcome for which they argue, or which they reach, is not only called for by the legal texts in question, but is in an important sense itself just. To say that the law requires an outcome, while admitting that it is unjust, or to claim that justice requires an outcome, while admitting that the law does not permit it, is to make a fatally incomplete and defective argument. The simultaneous insistence upon law and justice produces a constant pressure to think and rethink both what justice is and what the law requires. It is an engine for opening the law to our deepest values.

I have spoken here of the law at its best. Of course it is often corrupted, like any social and cultural form. Sometimes it is very bad: unthinking, conclusionary, authoritarian, sentimental, erasing the experience of others, bullying, inhuman, not connected in any good way with either reality or justice. But it always has within it the seeds of its own excellence,

and to spend a life thinking, as lawyer and teacher, about what these excellences are, and what they might be, has been for me an extraordinary pleasure and privilege.¹²

That passage prompted me to reread Lon Fuller's *Legal Fictions* (1967), which has much to suggest about that which White calls 'a positive fiction'. The third and final chapter in Fuller's book offers a reading of Hans Vaihinger's *Die Philosophie des Als Ob* (1911), which is a study of the influence of the fiction in various aspects of human intellectual activity.¹³ Fuller presents Vaihinger as claiming that fictions 'taint' all our thinking and that the fitting use of them calls for this rule: 'The fiction must drop out of the final reckoning.'¹⁴ Fuller suggests that the rule is problematic to the extent that 'fictions' are an integral part of our thinking, which enables us not to 'mirror reality' but to 'deal with reality'.¹⁵ Fuller's work on legal fictions may well be a vital part of White's constitution, which includes a way of imagining not just reality in general but the possibilities 'of the law at its best' in particular. Whatever the case may be, an engagement with Fuller should be productive for anyone seeking to more fully tune in to White's image of the law.

Those who move between Fuller and White may find themselves with materials with which to attend to questions about what is wrong with the dominant image of the *Homo economicus* fiction. This image is mechanistic in character: he (uncommonly she) is a calculating being, who does nothing but 'analysis of the costs and benefits [he] happens to perceive', motivated by a 'reduced' form of self-interest, which is separated from issues of justice. Such a being cannot think and talk about law 'at its best', because value judgments of this kind are beyond the pale of 'science'. After reading Fuller and White, we might be persuaded that this *Homo economicus* should become less fragmented and more integrated, lest we become equally fragmented. The cost of doing so may be the inability to come up with a general definition of that which we call 'the economy'. But that 'cost' may be a 'benefit', to the extent that economists and lawyers would have something in common concerning their respective 'fields'. (This

¹² 'Interview with James Boyd White' (2007) 105 *Michigan Law Review* 1403, 1418-19.

¹³ Vaihinger's book surfaced in English in the following decade – *The Philosophy of 'As if': A System of the Theoretical, Practical and Religious Fictions of Mankind* (trans C K Ogden) (1924).

¹⁴ L Fuller, *Legal Fictions* (1967) 115 and 117.

¹⁵ Ibid 94 (n 3) and 124. Fuller suggests that Vaihinger works with conflicting lines of thought that were not given the coherence that could have been given to them. Thus, 'a . . . criticism of Vaihinger would seem to be . . . that he never fully realized *what* he had proved' (124).

commonality could take them to adopt Fuller's 'eunomics', which is 'a neglected branch of jurisprudence' that lends itself to 'the study of good order and workable social arrangements'.¹⁶) In short, economic imperialism might die a natural death, due to the absence of a fixed definitional identity and of a healthy tolerance for living without one.

* * *

This Thesis opened with some words from Ismail Mahomed, spoken in response to the honor of being appointed Chief Justice of South Africa. Later in 1997 he gave a speech at a dinner given by the Johannesburg Bar to celebrate his appointment. His speech can be read as an early attempt to put together an image of the law worthy of respect, an image with justice at its heart. Let him speak at length:

The Johannesburg Bar means a great deal to me. I was a member of that Bar for more than thirty-four years. For me it was more than a professional organization. It has been in effect my life in a profoundly relevant sense: consuming almost my entire intellectual and moral energies for nearly two generations; influencing and provoking my responses to the political and institutional forces which impacted upon me during some very significant period of history in the life of my country; sustaining for me some of the deepest emotional relationships which it generated; regulating much of my moral compass; conditioning my intellectual discipline and in the last instance giving focus and substance to much of my very identity as a person as I moved from the first exciting flashes of adulthood, through the maturing frustrations of middle age, to the apprehensions about the approaching winter of my life.

Many contradictory images and awesome shadows flash before me when I recall this life and the dramatic events which followed upon my departure from the Bar, as our nation sought release from the unsustainable weight of its past.

There is nostalgia and satisfaction—even pride—in the recall, but also much pain and shame; richness and fulfilment, but also humiliation and indignity—all strangely coalescing in a dance culminating in some perceptions with a vindicating crescendo.

The pain and humiliation were intense. My status was determined by reference not to what I was but was not. I was '*non-white*'. It set about imposing on me a badge of inferiority

¹⁶ L L Fuller, 'American Legal Philosophy at Mid-Century' (1954) 6 *Journal of Legal Education* 457, 473 and 477.

sought to be written on my forehead. Its dominant consequence manifested itself in rejection and exclusion—a constitutional exclusion from the Bar in my home city, leaving me to find an alternative Bar in Johannesburg; exclusion from the right to occupy any office in chambers for counsel in Johannesburg, leaving me for twelve years to squat from hour to hour and from office to office in the chambers of one or other colleague temporarily in court; exclusion from the common room frequented by these colleagues, leaving me to consume my sandwiches in vacant offices or corridors, and when this was not convenient, even toilets on occasion; a directed but unheeded exclusion from the robing room used by other colleagues, leaving me to cope with the consequences; exclusion from the right to sleep overnight in Bloemfontein during appearances before the highest court, leaving me to skulk across the border of the Free State before sunset to find accommodation from night to night more than a hundred kilometers away. These exclusions reinforced a multitude of other exclusions which denied my humanity. They inflicted deep wounds inside me, often revived in the telling, with a special kind of pain without bitterness.

There was a special sting about this form of exclusion. The study and practice of law has appealed to my idealism, because the justification for law was its pursuit of *justice* and its capacity to resist injustice. But it was through the instrumentality of law itself and the institutions of justice that palpable injustice was inflicted on me and other persons of colour. But this paradox was not without compensation: it enabled me to focus more intensely and consciously on what the philosophical and ethical legitimate ends of justice were, the degree to which they were manifestly inconsistent with the laws which regulated life in the land of my birth, the reason why they should be revered and never, never be repeated.

This was a focus shared by some others at the Bar. There are superb examples of the courage and tenacity displayed by advocates of extraordinary gifts and talent, but there was a demeaning state of impotence which debilitated the mainstream. What was a pathology sometimes came unconsciously to be accepted as normal. The sensitivities towards injustice became blunted. A creeping apathy, resignation and even despair eroded the theoretically majestic ends of the law. The passion for justice which inspired so many was effectively diverted in many cases into a sterile subculture in which debate on the ethical rationale for just laws became irrelevant, many lawyers retreated into the technicalities of a very constricted legal positivism, which increasingly made recourse to moral values remote in the interpretation and enforcement of fundamental rights and duties. Instead of a coalescence between law and justice, there grew a dangerous distance between the two, and the law and lawyers began to lose much of their legitimacy among people who they were unable to protect against injustice.

All this is painfully true, but it is not the whole truth. There were other influences and traditions at the Bar which never died and which must be crucial for the commitment made by the new Constitution to bring real justice, dignity and freedom to all the citizens of this potentially extremely exciting country, of so much promise and richness; so much romance and cruelty. I am infinitely richer for the opportunity to be exposed to these influences and traditions.

What are these traditions?

The first is the tradition of thorough scholarship, pursuit of forensic excellence, capacity for rational thought, intense intellectual energy and unremitting discipline which barristers have always been expected to apply in the discharge of their briefs. There must be few endeavours in all civilization which can compare to the totality of commitment and the punctilious regard for detail which a competent and conscientious advocate harnesses in support of his or her case. This is a great and impressive tradition bred in very competitive conditions, which enriches the level of legal debate in the resolution of jurisprudential and factual disputes, and, ultimately, in a very crucial sense, the quality and legitimacy of the Bench, and the image of justice itself.

A second and related tradition is a fierce independence and an uncompromising standard of intellectual integrity and capacity for objectivity which informs the best at the Bar. It was sometimes displayed with a towering magnificence, and with it came a depth of courage and a willingness to champion causes and litigants often unpopular in the public perception.

These traditions are formidable. They have nurtured generations of successful advocates at the Johannesburg Bar. They have sustained some of my deepest and most meaningful friendships, penetrating sometimes with real power the artificial barriers erected to separate me from those emotionally and intellectually close to me.

As a young junior I often watched with absolute awe and wonderment the depth of these traditions and their potential to bring sparkle in forensic combat from the Bar; to bring admiration—even adulation—from the public affected by their exercise and in their even more crucial potential, ultimately to bring legitimacy and respect for law itself, and to grace the civilization which it seeks to mediate.

But much of this potential was blunted and distorted by the rigidity of the doctrine of parliamentary sovereignty which immunized cruel and irrational laws from judicial review; and by the conservatism of administrative-law traditions which left lawyers—curiously mistrusted by history and literature—vulnerable to the unfair and uninformed perception that they practiced skills which were only linguistic and technical in substance; that they were selfish, egotistical and even parasitic, and were unconcerned with the pursuit of justice.

These were and are dangerous perceptions for any society to foster, because the logical consequence of delegitimizing the law and lawyers must be to subvert that order and organization essential to the survival of any defensible civilization. Arguably, much of the terrible lawlessness which stalks our land represents the consequences of that subversion.

What this experience *does* confirm with a compelling relevance is the peremptory need for lawyers to insist, at all times, that the attainment of justice is the ultimate rationale for all law; that law cannot be distanced from justice and morality without losing its claim to legitimacy; that the ethical objectives of the law contain the lifeblood of a nation; that justice must not only be procedurally fair but substantially fair in its execution; that the law must be seen to be fair and to impact on the life of the humblest citizen in search of protection against injustice; that the law is accessible, intelligible, visible and affordable; and that any retreat from these truths imperils the very quality of and status of an enduring civilization.

These truths may not be new, but their capacity to resonate in a potentially renascent South Africa *is*. The new Constitution articulates their foundations; it protects the values on which they are premised; it gives to the creativity of lawyers a demonstrable leverage in attacking laws inconsistent with its ethos; it accords to lawyers an expanded field for real fulfillment in areas previously excluded by the sterility of the doctrine of parliamentary sovereignty; and it equips them and the courts with teeth which are sharp and biting enough to snarl and chew on visible manifestations of injustice—whether such injustice emanates from within or outside the agencies of the state; whether it is sought to be protected by a statute or regulations inconsistent with the Constitution; or whether it is protected by some perceived rule of the common law which rests on an articulated or assumed premise that is constitutionally illegitimate.

There is a freshness, a potency and an opportunity in this challenge, which is very different from that which confronted my generations at the Bar. To sustain a human-rights culture it is no longer necessary to collide with the law. It is necessary only to harness it creatively. That remarkable humanitarian ethos of Africa, expressed through ubuntu, is no longer a remote sociological construct; it is a constitutionally identifiable objective.

But the successful pursuit of this potential romance has its own structural challenges. First, it needs the support of a widely disseminated *culture* of constitutionalism and human rights, protected and asserted by organs of civil society outside the Bar and the courts. This is a culture which needs systematically to be entrenched within the psyche of the nation. It is sometimes very fragile, notwithstanding the example set by a President who has through his suffering and dignity come to symbolize for so many of us some of our sweetest dreams of nobility in this century, and a Minister of Justice who has through his commitment to justice and his accessibility given a new and powerful voice to *justice*.

The second and related problem is even more complex. It arises from the awesome legacy of real poverty, despairing unemployment, disempowering illiteracy, debilitating malnutrition and the consequences of pervasive discrimination on grounds of gender and race, which we have inherited from our past. It might be difficult to persuade its victims that a culture of constitutionalism is a priority or even a relevant aspiration for the needs. Their priorities might understandably be very different.

The third difficulty arises from the structure of the Bar and the Bench. It is overwhelmingly white and male. This compromises the effectiveness of these institutions in the perception of those affected by their claim to render substantive, procedural and distributive justice. Imaginative, creative and vigorous procedures need imperatively to be devised and executed to correct the balance and to identify and harness the potential of those Blacks and women unfairly prejudiced in the recruitment of legal talent to the Bar and the Bench.

The conquest of all these difficulties is a journey, not a destiny. It is a journey which must be undertaken with a faith which is optimistic and a temper which is positive. That condition generates its own formidable momentum. But the reverse is also true: pessimism has its own awesome power to generate its own malignant growth. There are few institutions better equipped than the Bar, by the training of its members and by their traditions, to give form and content to and to accelerate that journey. Its members have the capacity to do this both by their service to the community and their inputs into the Bench. The Bar remains potentially one of the great institutions of this complex land, of intoxicating beauty and potentially exciting promise.

The Johannesburg Bar has honoured me tonight with an abundance which has affected me very deeply and emotionally. It is a great privilege to be regarded as a close friend of the Bar and to enjoy its esteem. That privilege requires the discharge of two duties. The first is the duty to be frank. I have tried to be that. The second is to articulate a vision for the Bar and its dream for the country. I will discharge that duty by reliving with Rabindranath Tagore that noble dream which captures so much of the visionary in the lawyer:

Where the mind is without fear and the head is held high;
 Where knowledge is free;
 Where the world has not been broken up into fragments by narrow domestic walls;
 Where words come out from the depth of truth;
 Where tireless striving stretches its arms towards perfection;
 Where the clear stream of reason has not lost its way into the dreary desert sand of dead habit;
 Where the mind is led forward by thee into ever-widening thought and action —

Into that heaven of freedom; my Father, let my country awake.¹⁷

That passage could serve as an analogical source for someone talking to a general reader who is embarking on a first reading of White's work as it concerns 'the law'. What strikes me most about that passage is the voice, or rather the range of voices (*Voice). I hear a polyphonic person who fuses not only 'the mind' and 'the heart' but also 'the professional' and 'the personal' in a manner that negates any sense of separateness. Like White, Mahomed addresses his audience as whole persons. Mahomed would resist those who would reduce 'the law' to a set of rules and who would radically separate law and justice. For both Mahomed and White, the law is a complex aspirational activity, one which can be transformed into an instrument of oppression, a transformation that we all, lawyers and nonlawyers alike, will do very well to resist, lest we be responsible for the decay of 'civilization'. Both direct attention to the law at its best. In doing so they provide ground for judging what counts as bad law, the edge of lawlessness – unthinking, conclusionary, authoritarian, sentimental, erasing the experience of others, bullying, inhuman, not connected in any good way with either reality or justice. In providing such ground, they offer the law water for the seeds of its own excellence.

Like White, Mahomed defines the law as an inherited conversation that has a vital place for lawyerly 'creativity'. Without this creativity we are left with 'sterility', which is the material of 'visible manifestations of injustice'. It is readily understandable that Mahomed concerns himself with law's becoming. We can be sure that for Mahomed the answer to our question 'What is becoming of the law?' is not independent of our compositions about it, and not independent of who we become in our compositions. We would do well to embrace 'contradictory images', not the least because they can provide material for 'a dance culminating in some perceptions with a vindicating crescendo', a dance that can transform 'palpable injustice' into a gift of some kind ('it enabled me to focus more intensely and consciously on what the philosophical and ethical legitimate ends of justice were'). The musical metaphor 'crescendo' may serve as a vital medium for the pursuit of a plausible harmony, a living justice.

¹⁷ 'Address by the Honourable Mr Justice Ismail Mahomed at a Dinner given by the Johannesburg Bar on 25 June 1997 to celebrate his Appointment as Chief Justice of the Supreme Court of Appeal' (1997) 114 *South African Law Journal* 604, 604-09.

Mahomed's speech brings to mind some reflective remarks made soon after World War II. The remarks were made by a German lawyer to Lon Fuller:

I know we Germans have an enormous burden of guilt, which all of us share, regardless of our politics. But I think we have also something to teach the world. We have gone through an experience no other civilized people has had to the same degree. We have seen disappear almost overnight all the elementary decencies of law and government that you take for granted. In the process we have learned, as you have not had a chance to learn, what is fundamental in law and government.¹⁸

Mahomed, who has experienced a process in which 'all the elementary decencies of law and government' have gone, similarly offers to teach 'what is fundamental in law and government'. What he has to teach may well resemble what White has to teach with *The Legal Imagination*, judging from my efforts to make sense of why he included the fragment from *A Digest of the Laws of the State of Alabama* (1843). The fragment can serve to ensure that we do *not* 'take for granted' that which is 'fundamental'.

Mahomed delivered his speech at about the time Karl Klare started a conversation about 'transformative constitutionalism' in South Africa. Klare invites, to use his language directed at the Constitution, 'a new imagination and self-reflection about legal method, analysis and reasoning'.¹⁹ Justice Mahomed's speech offers an excellent model in this regard.

* * *

The first lecture I went to as a law student introduced me to *Donoghue v Stevenson* – 'The Snail's Case'. This case, the lecturer said, is one of the most important cases ever decided by the courts, not the least because it is a grand landmark in the modern tort of negligence. Two people went to a café in Scotland. One of them bought a bottle of ginger-beer for the other to drink. The bottle, being dark, concealed a decomposing snail. The snail came out after one glass of the ginger-beer had been consumed. Before the courts, the consumer alleged shock and gastroenteritis. Given that the party who suffered did not pay for the drink, there was no question of a cause of

¹⁸ Quoted in Fuller, 'American Legal Philosophy', op cit, 485.

action in contract. In the House of Lords, Lord Atkin put the issue as follows: 'Whether, as a matter of law in the circumstances alleged, the defender any duty to the pursuer to take care.'²⁰ In response to this question, he incorporated into negligence law one of the basic injunctions of the Bible, namely to love your neighbour:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to me to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine in *Heaven v Pender* as laid down by Lord Esher²¹

The attention in the lecture centered on the *ratio decidendi* and on the process of reasoning by analogy. A lecturer with an interest in transformative constitutionalism could have talked about the *possibilities* of law. Some questions for this line of inquiry could include: How did Lord Atkin come up with the 'rule' concerning one's neighbour? How did he come up with this particular 'lawyer's question'? After all, Lord Buckmaster didn't. (With Robert Ferguson, we can be sure that '[t]he real creativity in a judicial decision lies in the question that judges decide to accept as the basis of their deliberations'²²) Law might be a language of 'rule' and 'doctrine', but it is also potentially a language of 'love'. Too much emphasis on 'rule' and 'doctrine' can destroy the capacity for 'love', and thus for its companion justice.

Whilst reading Lord Atkin's speech after the first lecture, a fragment at the end of the speech grabbed my attention. Here it is the fragment:

¹⁹ K Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 156.

²⁰ *Donoghue v Stevenson* [1932] AC 562.

²¹ *Ibid* 580-1.

²² R A Ferguson, 'The Judicial Opinion as Literary Genre' (1990) 2 *Yale Journal of Law & the Humanities* 201, 208. It would seem to me that the *Donoghue* speeches offer material with which to challenge the following claim of Ferguson's regarding majority and dissenting opinions.

The only sincere questions in judicial opinions – sincere in the sense that they ask for answers beyond the ken of the interrogator – appear in dissents. By way of contrast, a controlling opinion uses questions to establish agreed upon solutions. In an insistence upon *an* answer *now*, it resists mystery, complexity, revelation, and even exploration. (210)

It is always a satisfaction to an English lawyer to be able to test the application of fundamental principles of the common law by the development of the same doctrines by the lawyers of the Courts of the United States. In that country I find that the law appears to be well established in the sense in which I have indicated. The mouse had emerged from the ginger-beer bottle in the United States before it appeared in Scotland, but there it brought a liability upon the manufacturer. I must not do more than refer to the illuminating judgment of Cardozo J. in *MacPherson v. Buick Motor Co.* in the New York Court of Appeals . . . , in which he states the principles of the law as I should desire to state them, and reviews the authorities in other States than his own. Whether the principle he affirms would apply to the particular facts of that case in this country would be a question for consideration if the case arose. . . .

My Lords, if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form which they left them with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

It is a proposition which I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense. I think this appeal should be allowed.²³

Lord Atkin here seeks a source of authority external to the House of Lords. He speaks as one who has something to learn from others. He turns not just to the New York Court of Appeals but also to 'sound common sense'. He speaks not just legal language but also ordinary language and in doing so, to echo White on Justice Brandeis (*Voice), 'invites a conversation not only among lawyers but among citizens, a conversation in that sense democratic.'²⁴ His openness is, for me, what makes this judgment to a significant extent 'sound'. Lord Atkin, if I may carry over Don Pedro's Shakespearean

Does not Lord Atkin's question embrace and stimulate 'mystery, complexity, revelation, and even exploration'?

²³ Ibid 598-99.

²⁴ *Justice as Translation* 154.

words describing Benedick, 'hath a heart as sound as a bell, and his tongue is the clapper, for what his heart thinks, his tongue speaks.'²⁵

The lecturer failed to make any evaluative judgments regarding differences between Lord Atkin's speech and Lord Buckmaster's. This failure arguably takes us away from the heart of justice talk. Let us hear some of Lord Buckmaster's words:

The law applicable is the common law, and, though its principles are capable of application to meet new conditions not contemplated when the law was laid down, these principles cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit.²⁶

In *Mullen v Barr & Co. . . .*, a case indistinguishable from the present excepting upon the ground that a mouse is not a snail, and necessarily adopted by then Second Division in their judgment, Lord Anderson says this: 'In a case like the present, where the goods of the defenders are widely distributed throughout Scotland, it would seem little short of outrageous to make them responsible to the members of the public for the condition of the contents of ever bottle which issue from their works. It is obvious that, if such responsibility attached to the defenders, they might be called on to meet claims of damages which they could not possibly investigate or answer.'

In agreeing, as I do, with the judgment of Lord Anderson, I desire to add that I find it hard to dissent from the emphatic nature of the language with which his judgment is clothed. I am of opinion that this appeal should be dismissed, and I beg to move your Lordships accordingly.²⁷

Why did Lord Buckmaster fail to 'move' his fellow Lords? (Were they better placed to escape from the slippery slope image?²⁸) If he had lived longer, he might have been persuaded that with regard to persuasion 'one comes at least to a mystery, the mystery of one mind working on another.'²⁹ What would it have taken to 'move' Lord Buckmaster closer to Lord Atkin's position and to his manner of speaking? What question, we might ask, led to his monophonic text? Why is there no recognition of

²⁵ W Shakespeare, *Much Ado About Nothing* in (1598; 2007) (eds J Bate and E Rasmussen) 3.2.8-9.

²⁶ Donoghue, op cit, 567.

²⁷ Ibid 578.

²⁸ This question draws from R Charnock, 'Overruling as a Speech Act: Performativity and Normative Discourse' (2009) 41 *Journal of Pragmatics* 401, 412.

²⁹ *The Legal Imagination* 845.

alternative standpoints worthy of respect? Perhaps the metaphors that he was living by deafened him to them? After all, what is 'the law' if it is 'laid down'? And, what is a judgment if it is 'clothed' with 'language'?

When I first read Lord Buckmaster's 'principles' talk – his aversion to 'change[]' when 'any particular meritorious case seems outside their ambit – they had a familiar ring. One source of the familiarity was John Salmond's introductory piece to the volume *Science of Legal Method* (1917), in which he imaged the law as a closed 'system':

The law presents itself primarily and essentially as a system of rigid rules in accordance with which justice is administered in the tribunals of the State to the exclusion of unrestricted judicial discretion of the judges and magistrates to whom this function is entrusted. . . . It is true that this system of administering justice according to law – legal justice instead of natural justice – has brought grave evils in its train. It is the source of technicality and formalism, the complexity and esoteric mystery, which have at all times been made a ground of reproach against judicial administration. Nevertheless, the good sense of all communities has at times recognized that in spite of these grave evils the balance of advantage lies beyond question on the side of administering justice in obedience to a rigid system of binding legal rules. . . . The evils which accompany and elaborate any technical legal system are many and serious, but they are the necessary price which a community pays for the release from greater evils. It is true that the administration of justice according to law is notoriously uncertain. Yet the extensive substitution of unrestricted judicial discretion for preëstablished rules of law would add to this uncertainty rather than diminish it. . . . It is true that the law necessarily lays down general rules which cannot take due account of the special circumstances of the individual case, whereas a court which is permitted to do justice at its good pleasure can take all those circumstances into consideration and act accordingly, observing that equity which, according to the old definition, mitigates the rigor of the law. Yet it is certain that this advantage is bought at too great a price. The same principle which allows a judge to take account of the individual merits of a particular case exposes him at the same time to all the perverting impulses of his emotional nature, to all his prejudices, and to the unconscious bias of his mental constitution. For one case in which, in any reasonable system of law, a court was constrained to do injustice because of necessary conformity to preëstablished rules, there would be many in which, unguided by such rules, he would be led astray by which the temptations which beset the "arbitrum judicis." . . .

The law is impartial. It has no respect for persons. Just or unjust, wise or foolish, it is the same for all, and for this reason men readily submit to its arbitrament. Though the rule

of law may work injustice to the individual case, it is nevertheless recognized that it was not made for the individual case and that is alike for all.³⁰

Who is this person speaking? How does he define himself and his reader and the relation between them? Where does he place the law among other human activities?

Salmond, by my reading, presents himself as something of an expert, one who tells his reader the way things are. He imaged the 'science' of law as isolating phenomena with a view to reducing the degree of uncertainty in what can be said about them. Salmond, like his Enlightenment-influenced academic ancestor John Austin, imaged the law as a self-enclosed 'technical legal system', and in doing so he put up a fence between 'the law' and 'justice'. Salmond eclipses himself: he does not write, '*I think the law is . . .*'. His depersonalization, I would say, is a defining feature of the material of 'formalism', a movement seeking to perpetuate the Enlightenment prejudice and emotion against prejudice and emotion. Salmond's framing of the choice between 'unrestricted judicial discretion' and 'preestablished rules of law' seems to me to be infelicitous. The real issue concerns various uses of, and ways of talking about, the vaguely limited and fluid discretion that a judge has to reconstitute a community. It is this very discretion that a judge may use to unite 'the special circumstances of the individual case' with 'general rules'. In using this discretion and in talking about its use a judge may seek to ensure that the law is just and felt as such to those who live by it. In all that he has to say, Salmond, as did Lord Buckmaster a decade later, offers not an image of justice as integrative conversation that the law is at its best but, rather, disintegrative lecturing that the law is at its less-than-best.

* * *

In 1848, Ngati Toa gifted land to the Anglican Bishop of Wellington for the purpose of building a school. The proposed school was not built. In 1850, Governor Grey had issued a grant that included the gifted land without the knowledge or consent of the chiefs. After a dispute with Church officials, Ngati Toa leader Wi Parata challenged the legitimacy of that grant. Excerpts from Prendergast CJ's judgment are as follows:

³⁰ J W Salmond, 'Introduction' in E Brunken and L Register (trans), *Science of Legal Method* (1917; 1921) lxxv-lxxxi.

On the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law. There is no doubt that during a series of years the British Government desired and endeavoured to recognise the independent nationality of New Zealand. But the thing neither existed nor at the time could be established. The Maori tribes were incapable of performing the duties, and therefore assuming the rights, of a civilised community. . . . [T]he Crown was compelled to assume in relation to the Maori tribes, and in relation to native land titles, these rights and duties which, *jure gentium*, vest in and devolve upon the first civilised occupier of a territory thinly peopled by barbarians without any form of law or civil government. . . .

On the cession of territory by one civilised power to another, the rights of private property are invariably respected, and the old law of the country is administered . . . by the Courts of the new sovereign. . . . But in the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based. Here, then, is one sufficient reason why this Court must disclaim the jurisdiction which the plaintiff is seeking to assume. . . .

The existence of the pact known as the 'Treaty of Waitangi' . . . is perfectly consistent with what has been stated. So far as that instrument purported to cede the sovereignty – a matter with which we are not directly concerned – it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist. So far as the proprietary rights of the natives are concerned, the so-called treaty merely affirms the rights and obligations which, *jure gentium*, vested in and devolved upon the Crown under the circumstances of the case. . . .³¹

That judgment brings to mind this proverb: 'He tao kii ekore e taea te karo, he tao rakau ka taea ano te karo', or, 'A spoken spear cannot be warded off, a wooden spear can easily be warded'.³² Readers familiar with historical context against which Prendergast CJ acted with words might sense that the Court is completing and justifying the wars that began earlier in the previous decade. Many settlers imagined the indigenes to be beyond the pale, to be 'primitive barbarians'; they reduced the indigenes to objects, denying their equal claims to 'property'. The language of race was part of the language of war, which established an inherent difference between 'us'

³¹ *Wi Parata v Bishop of Wellington* (1877) 3 *New Zealand Jurist* (New Series) SC 72, 77-8.

and 'them', dehumanizing the Other. Prendergast CJ's use of the language of race can be taken to be part of the process of colonial assimilation, carried out by physical violence, and the threat of it. Prendergast CJ's so-called judgment was a spoken spear.

Why 'so-called'? The matter of whether there 'existed' an 'independent nationality' could have been argued either way, with complex claims on each side, the material of alive speech. But Prendergast CJ reduces 'independent nationality' to a 'thing', involving 'performing' 'duties', which he simply declares 'Maori tribes' to be 'incapable of' doing. He offers no 'explanation' worthy of the name. Dare his reader question his declaration? Dare his reader ask why he addresses the question about the existence of an 'independent nationality' in the first place? The parties to the *Treaty of Waitangi* were 'Her Majesty Victoria' and 'the Chiefs of the Confederation of the United Tribes of New Zealand' and 'the Separate and Independent Chiefs of New Zealand'. There was a significant question of the identity of the party before the Court, again with complex claims possible. Associated with this question of identity is the question of the meaning of the word 'sovereignty' as used in the *Treaty*, especially in relation to 'property'. This question could lead to a volume or more, but Prendergast CJ reduces 'sovereignty' to an objective 'thing', leaving no room for anything worthy of the name 'interpretation'.

Having made distinction between a 'civilised power' and 'primitive barbarians', an apparently obvious distinction to him, Prendergast CJ confidently talks of the necessity ('must') for different treatment with regard to 'rights of private property' and 'native proprietary rights'. He asserts that the latter and their relation to the will of 'the supreme executive Government' cannot be a topic of justice talk, for there were 'no known principles whereon a regular adjudication can be based.' The putative non-existence of any such principles did not prevent him from innovating, with the assistance of authorities such as Chief Justice Marshall's opinions in the *Cherokee Cases*,³² and explicitly creating one or more of them. But to do so would have ran counter to what Prendergast CJ seems to want to do, namely, maintain the pretence that the law is a system of known rules applied by a judge. Prendergast CJ's voice of Reason echoed the Enlightenment's sharp separation of fact from value, a separation

³² W Colenso, 'On a better Knowledge of the Maori Race' (1879) *Transactions and Proceedings of the New Zealand Institute* 128.

³³ See R Dawson, *The Treaty of Waitangi and the Control of Language* (2001) 47-53.

associated with a sharp distinction between *what the law is* and *what the law ought to be*. The issue of *what the law is* was considered an 'objective' one. The issue of *what the law ought to be* was considered a 'subjective' one. In all of this, the only voice Prendergast CJ seems to value was his own, a disembodied voice that asserts its own unquestioned validity and that renders the core of the Treaty a 'nullity' under the pretence of registering a pre-existent given. Wi Parata's voice is given no genuine place to stand. With this act of silencing, 'law' and 'justice' are deemed to be two distinct concerns. Prendergast CJ's judgment offers not the rule of law but the rule of unreasoned and undisciplined prejudice. Prendergast CJ acts unjustly toward Wi Parata and toward all other indigenes, in their individual and their various collective capacities.

In modern Waitangi talk, Prendergast CJ's *Wi Parata* judgment is commonly talked about as being problematic at the level of rules. Prendergast CJ, we hear, 'misunderstood' the doctrine of aboriginal title.³⁴ Whilst the authority of *Wi Parata* has been undermined in one sense, it remains authoritative at the level of its way of imagining law as a lifeless object, in the form of a closed system of rules. The doctrine of Parliamentary Sovereignty is considered to be 'trumps'. Here the word 'Sovereignty' is commonly used in the dead manner that suggests it carries its own meaning. Law and Justice evidently are imagined to be separate, lifeless 'things'.

The Courts have repeatedly declared that the *Treaty* is not part of New Zealand's domestic law until 'it has been incorporated in a statute'.³⁵ What are to think about the word 'incorporated', the root of which is 'in the body'. If 'the law' is imagined not as a body of rules but as a compositional process, then we may feel summoned to try and turn Treaty law inside out in the name of justice.

* * *

In the mid 1990s, Ngati Apa and seven other Maori iwi collectively expressed frustration and concern about the impact of marine farming on what they considered to be their customary rights. The tribes took a case to the Maori Land Court, claiming that areas of the foreshore and seabed in the Marlborough Sounds were 'Maori customary land'. In an interim decision, the Maori Land Court, in 1997, held that these areas may be such land. The Crown, along with the New Zealand Marine Farming

³⁴ Ibid 155-60.

Association, Inc., Port Marlborough New Zealand Ltd., and the Marlborough District Council, challenged the claim, arguing that the Court had no jurisdiction. The foreshore and seabed, they claimed, were not 'land' for the purposes of the Maori Land Act. In 2001 the High Court decided in their favour.³⁶ The Court applied lines of reasoning used in *Re the Ninety-Mile Beach* and ruled that Maori customary property in the foreshore was extinguished once the adjoining land above high water mark had lost the status of Maori customary land.³⁷

With the position that *Re the Ninety-Mile Beach* was a dubious authority, the tribes took the matter to the Court of Appeal. The Court, in 2003, overruled *Re the Ninety-Mile Beach* and unanimously held that the Maori Land Court did have jurisdiction to hear the claims, and to investigate the status of 'land' in the foreshore and seabed. The Court stated that the judgment in *Re the Ninety-Mile Beach* case kept a problematic aspect of *Wi Parata v Bishop of Wellington* alive, in particular the notion that 'through the acquisition of sovereignty, all land in New Zealand became owned by [the Crown].'³⁸ That notion, Court's ruled, was incorrect. Elias CJ stated: 'The error of this approach was . . . its equation of sovereignty with ownership (conflating *imperium* and *dominium*).'³⁹ Commenting on *Re the Ninety-Mile Beach*, she said, 'it is clear that the

³⁵ *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590, 596.

³⁶ *Attorney-General v Ngati Apa* 2 NZLR (2002) 661.

³⁷ *Re the Ninety-Mile Beach* (1963 NZLR 461) had its origins in 1955, when Waata Tepania of Ahipara lodged an application in the Maori Land Court seeking an investigation of title into Wharo Oneroa a Tohe, the Ninety Mile Beach. The Crown eventually questioned whether the Maori Land Court had jurisdiction to inquire into the foreshore and issue titles to it. Citing *Wi Parata*, among other cases, the Solicitor-General submitted that the common law of England had applied to New Zealand as from the date of the assumption of sovereignty; that it was part of the common law that the title to the foreshore was, and remained, in the Crown; and that no one else could, except by Act of Parliament, acquire any right of interest therein. North and Gresson JJ gave judgments. North J considered it 'pertinent to observe that at this late period in the development of New Zealand,' the claim, 'if well founded, would have startling and inconvenient results' (at 467). In particular, 'the owner of property the title to which showed the ocean as a boundary might be faced with the contention that although his title ran to the line of high-water mark at ordinary tides, he had no legal right of access to the sea.' No similar valuation was expressed in regard to how 'inconvenient' it might be for the tribe to maintain its traditions and thus its identity. It is thus hardly surprising, then, that the case was decided in favour of the Crown. The Justices, however, were not persuaded by what North called (at 468) 'an attractive simplicity' in the argument about the Crown being the owner of the foreshore by 'prerogative right' following its 'assumption of sovereignty.' North and Gresson JJ gave particular significance to the Maori Land Court, especially the assimilative intent expressed in the statute creating it. They asserted that the process of investigation of title by the Native Land Court was sufficient to extinguish native title to the foreshore. It was ruled that 'once the Court investigated the title to customary Maori land bounded by the sea, and issued a certificate of title or made a freehold order in respect thereof the customary title was extinguished.' As 'a consequence, the Crown was freed from any obligations it had undertaken in the Treaty of Waitangi.' From that moment on (at 474), 'pakeha and Maori alike were entitled to enjoy the beaches of the country.'

³⁸ *Attorney-General v Ngati Apa* (2003) 3 NZLR 643 [25] (CA).

³⁹ *Ibid* [26].

premise upon which the Court based its conclusions . . . was an assumption that the English common law of tenure displaced customary property in land upon the assumption of sovereignty.⁴⁰ Contrary to *Re the Ninety-Mile Beach*, 'the investigation through the Maori Land Court of the title to customary land . . . cannot extinguish any property held under Maori custom in lands below high water mark.'⁴¹ Concerning law then and now, 'Whether there are such properties is a matter for the Maori Land Court to investigate in the first instance as a question of tikanga.'⁴²

The day after the Court's decision, Prime Minister Helen Clark announced that steps would be taken to confirm 'absolute Crown title' over the foreshore, and thus to remove the liberty of the tribes to approach the Maori Land Court for rights claims of this nature.⁴³ In response, a number of tribes turned to the Waitangi Tribunal. All claimant counsel urged on the Tribunal what it called in its *Report on the Crown's Foreshore and Seabed Policy* 'The Longer Conversation'. The Tribunal stated:

Maori really want . . . the opportunity to sit down with government and properly explore the options that are genuinely available. As we have said, they consider that they have not had the opportunity. . . . It may be that the conversations would be long ones, and would take place over an extended period. We think it is appropriate. The issues are complex. . . . Although Maori clearly prefer the path through the courts to the one proposed by the Government, the subtleties of each are almost certainly imperfectly understood. It is also very doubtful that the Government really understands where Maori are coming from. The adversarial way in which the issue has developed has led to people taking positions rather than really communicating. In our hearing, we heard from some outstanding people about their perspectives of where the Maori interests lie in terms of tikanga and identity. We think that the government needs to hear those korero.⁴⁴

The Tribunal here, we might say, calls for the simplest principle of justice, namely to be given a hearing. Elsewhere the Tribunal suggested that the proposed legislation was contrary to 'the rule of law'.⁴⁵ Several days after the release of the *Report*, Deputy Prime Minister Michael Cullen denounced the Tribunal's 'rule of law' talk, especially

⁴⁰ Ibid [79].

⁴¹ Ibid [67].

⁴² Ibid [88].

⁴³ Quoted in M Jackson, "'Like a Beached Whale': A Consideration of Proposed Crown Actions Over Maori Foreshore", in L Pihama (ed), *Te Takutai Moana* (2003) 13.

⁴⁴ Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (2004), 139-40.

‘the implicit rejection of the principle of parliamentary sovereignty’ – the ‘power of Parliament to change the law’ he said, ‘is central to the exercise of sovereignty and therefore to the contemporary exercise of Article One of the Treaty [of Waitangi].’⁴⁶ This absolutist sovereignty talk would be echoed by the Deputy Prime Minister in reference to the enactment of the *Foreshore and Seabed Act* 2004 (a purpose of which included ‘vesting the full legal and beneficial ownership of the public foreshore and seabed in the Crown’⁴⁷), which ruled out of ‘the longer conversation’. The heartless Cullen showed no interest in a ‘conversation’ worthy of the name. In ruling out the Tribunal’s invitation for a proper hearing, those speaking in the name of ‘the Crown’, by my reading, acted unjustly toward the indigenes. Law and Justice, as I claimed in my LLM Thesis, were (and still are) wholly apart.⁴⁸ What a grand ‘lost moment’!⁴⁹

* * *

In 2006, I sent an email to an authority on law relating to the *Treaty*. Concerning the direction of my academic work, I said this to Dr Zoe (a fictitious name):

I am particularly interested in working out, centering on the Treaty alone, what can be done to challenge the legality of the Foreshore and Seabed Act. At the very least, it seems to me, one needs to harmonize ‘the legal’ and ‘the just’, which Prendergast, in the spirit of the times, treated as separate ‘things’. My current work aims as such a harmony, and I am wondering if we could converse about the merits of the argument.

I received a response from Dr Zoe, a fragment of which is as follows:

I have never understood why people like the Confederation of United Tribes and others take cases to state courts using mechanisms such as the Declaratory Judgments Act to try to have Maori sovereignty recognised and then take offence when their applications are declined. I confess that your expectations that one can ‘harmonize’ ‘the legal’ and ‘the just’ seems

⁴⁵ Ibid 129.

⁴⁶ Hon Dr M Cullen, ‘Waitangi Tribunal Report disappointing’, 8 Mar 2004, <http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=19091>.

⁴⁷ Section 4 (a).

⁴⁸ For a discussion drawing from my LLM thesis, see R Dawson, ‘Doing Justice in “Takings” Cases: From Coal to Sand’ (2006) 12 *Canterbury Law Review* 292, 309-11.

⁴⁹ I have used this term in my ‘Treaty of Waitangi Sovereignty-Talk: Lost Moments’ (2008) 11 *Otago Law Review* 683.

equally unlikely to be productive. I am very much a legal pluralist. I believe in the fact of laws and systems of law in Aotearoa New Zealand and have never assumed that any one system of law can be equated with 'justice'. I happen also to agree with those critical legal scholars who argue that perceptions of 'justice' (whether of judges and officials, or of citizens) are subjective and personal. I am not sure that conversations with me would assist you in your project.

What is this 'Maori sovereignty'? Is not the S-word being used here in a dead, mechanical way here? Is not the voice of the *Wi Parata* judgment alive still? Why not turn to the great common-law mind of the eighteenth century, Burke, who offered some living speech about sovereignty when the American colonies were pursuing separation.⁵⁰ Perhaps if a lawyer spoke like him, consciously giving an old text a life that is at once old and new, the indigenes would begin to forge a meaningful place to stand and speak in their own home? We lawyers need to talk about sovereignty like Burke did, this is the material of 'argument from circumstance'.⁵¹

How helpful is it to talk about 'one system' of law? I suggest it is unhelpful to the extent that it suggests that the 'system' in question is a *closed* system. It is not. What we call 'the law' in this land is an open, evolving process. The question is, how can we best contribute to its and our becoming? What old texts can we give new life to in new circumstances, such as the enactment of the Foreshore and Seabed Act?

Of course images of 'justice ... are subjective and personal'. But 'subjective and personal' in what sense? Few people seem to ask that question, for many people in our culture, for much of the time, habitually assume that their words speak for themselves. But they have lost touch with the mystery of words, a loss that is easy in a world that splits the world in twos: academic versus personal, black versus white, objective versus subjective, and so on. The splits are the material of disintegration, or destructive fragmentation. This Thesis is written out of a will to resist this fragmentation, in the name of justice.

⁵⁰ See my 'The Common-Law Mind and Sovereignty-Talk, with Shakespeare's *King Richard II*' as an Analogical Source (2009) 15 *Canterbury Law Review* 48.

⁵¹ R M Weaver, *The Ethics of Rhetoric* (1953; 1985) 55.

Listening

Influenced by the Age of *Enlightenment*, our talk about knowledge is dominated by visual metaphors for knowing.¹ Through these metaphors, that which we are talking about, such as ‘the law’, can readily become an object, which can be ‘viewed’ from a distance. White’s work challenges the privileged place of vision with the use of oral-aural metaphors, such as ‘conversation’, ‘hearing’, ‘listening’, and ‘voice’.²

* * *

As mentioned in *‘This Book of Starres’*, White’s English teachers at Amherst College gave particular attention to vocalizing words on a page (*Attunement). They offered training in what has been called ‘ear reading’.³ That term comes from Robert Frost, who claimed that ‘[t]he ear is the only true writer and the only true reader.’⁴ Frost used the term ‘eye readers’ for those who ‘read without hearing the sentence sounds.’ They ‘get the meaning by glances’ and they ‘are bad readers because they miss the best part of what a good writer puts into his work.’⁵ Amherst ear reading, unlike conventional eye reading, trained readers not to *look* for ‘information’ or ‘ideas’ but to hear a voice and a character.

Echoes of Amherst-style ear training can be heard in *The Legal Imagination*. Consider, for example, this writing assignment on parody:

Write a parody of a legal speaker – lawyer, judge, legislator, or law teacher – and explain what you have done.

You may find that the best way to expose for analysis (and entertainment) the ways in which lawyers think and speak is to make fun of them. Parody trains the ear as almost nothing else can do, but it is a demanding art and not all of us are equal to it. Your rendition

¹ B J Hibbitts, ‘Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse’ (1994) 16 *Cardozo Law Review* 229.

² *Ibid* 326.

³ W H Pritchard, ‘Ear Training’, in *Teaching What We Do: Essays by Amherst College Faculty* (1991) 127, 130.

⁴ Quoted in Pritchard, *ibid*, 129.

of the legal speaker must be precise if it is to be made funny or illuminating. . . . You may find it most congenial to parody the law teacher or law student, and you should feel free to do so.

How do you explain what you have done? Is it a matter of catching a language, a turn of mind, or what? And what do you do when you have caught it: exaggerate it, twist it, isolate it? It may be useful for you to ask whether your parody is fair. Is it conceivable that you could make a parody of a mind or style you admire?⁶

This assignment can serve to reinforce White's repeated suggestion that mastering a language, including that of the law, involves not just learning words and grammar but also becoming competent in adopting a fitting attitude to one's audiences, an attitude that is expressed, for example, in one's tone. Parody, for White, is one of the ways in which we can work out our own sense of what might and might not be fitting, for others and for oneself.

For assistance with the assignment we could turn to White's reading, in *When Words Lose Their Meaning*, of Jonathan Swift's *A Tale of a Tub* (1704). Swift, according to White, 'parodies what seem to be two opposing tendencies of mind, both diseased: devotion to mechanistic systems and theories (instruments of universal explanation or universal improvement) on the one hand, and, on the other, an intoxication of the self with its own sensations of greatness, in the form of inspiration'⁷ White offers some materials from Thomas Hobbes' *Leviathan* (1651) with which his reader could begin a parody'.⁸ As for 'modern examples', he points us to 'the literature of cost-benefit analysis', 'theoretical literary criticism ("there are no texts, only interpretations of texts")', among other materials which 'the reader who has been trained by Swift should find . . . amusing and instructive'.⁹ In a passage expanding on the ear training opportunities Swift offers, White writes:

The way of reading it teaches consists largely in listening for a voice, then asking who speaks that way, then judging it. It thus constantly trains what could be called the ethical ear, for to be read at all one must constantly be assessing character as it is manifested in language. The

⁵ Ibid 129.

⁶ *The Legal Imagination* 957-58.

⁷ *When Words Lose Their Meaning* 326.

⁸ Ibid 325-26.

⁹ Ibid 326.

defects that appear in the text as delusion, false questions, withdrawals from reality, unlimited ambitions, failures to connect, and the like are not merely intellectual or cognitive deficiencies but diseases of character, the only remedy for which is the kind of wholeness and health Swift seeks to stimulate in the reader. To read sensibly, to write sensibly, and to be sensible are, for Swift, intimately connected.¹⁰

Does that not sound sensible? How could we have imagined otherwise? What cultural forces might be at work that can lead us to accept otherwise? Is it as simple as the pervasiveness of ocularcentric metaphors for knowing?

White's ear training can be connected to his approach to the topic of justice. For him, as expressed in *Heracles' Bow*, '[t]alk about justice is at its heart talk about character and relations.'¹¹ We can try to catch his drift with his examples:

Suppose the parents of a teenaged child ask, as they often understandably do, what rules they should adopt governing such things as curfews, dating, housework, allowances, school work, conduct towards siblings, music lessons, and so on. What answer could you – or Dear Abby or anyone else – possibly give them? Obviously there is no one set of correct or just or wise rules. Many fine parents have resolved these matters with their children very differently; many bad parents have no doubt used rules that looked very much like those used by parents of whom one would approve. Within very wide bounds what is critical is not the content of the rules but the relationship out of which the rules grow and which they in turn help to reconstitute. *What* the parent decides matters less than *how*; with what attention to the child's needs and circumstances, with what respect for his or her feelings and claims, with what voice, with what kind of listening (or 'hearing'), and so forth. If this analogy is thought to be inappropriately paternalistic, the same point could be made in connection with relations more explicitly equal – in a marriage, a professional partnership, certain business relations, and so on. The point is that the heart of what we mean by justice resides in questions of character and relationship and community – in who we are to each other – for this determines the meaning of what is done. If these things are got right, the material manifestations – the rules, the results – will take care of themselves; if they are not got right; the rules and results will be wrong, and this is true in the family, in the custody

¹⁰ Ibid 136.

¹¹ *Heracles' Bow* 134.

hearing, in the sentencing proceeding, in the ordinary trial, in national political arrangement, and in international relations.¹²

How are we to respond to that passage? Should we try to reduce it to a set of propositions and then try to refute them with another set? But would that not erase White's claim about the 'heart' of 'justice'? A fitting response may be to try to converse with the passage, to give it serious 'attention' (*Attention). If so, how are we to do that? What questions can we ask? What is a fitting, or just, response?

* * *

When words are written, they become part of the visual world, which lends itself to 'science', in the sense of the pursuit of 'objectivity' and 'detachment'. One of the most comprehensive invitations to question claims made in the name of 'objectivity' resides in Hans-Georg Gadamer's *Wahrheit und Methode* (1960), which was first translated into English in 1975, with the title *Truth and Method*. Gadamer here would have us resist claims about the superiority of the visual over the auditory:

It is not just that he who hears is also addresses, but there is also the element that he who is addressed must hear, whether he wants to or not. When you look at something, you can also look away from it, by looking in another direction, but you cannot 'hear away'. This difference between seeing and hearing is important for us because the primacy of hearing is the basis of the hermeneutical phenomenon There is nothing that is not available to hearing through the medium of language. Whereas all the other senses have no immediate share in the universality of the linguistic experience of the world, but only offer the key to their specific fields, hearing is a way to the whole because it is able to listen to the logos. In the light of our hermeneutical question this ancient insight into the priority of hearing over sight acquires a new emphasis. The language in which hearing shares is not only universal in the sense that everything can be expressed in it. The significance of the hermeneutical experience is rather that, in contrast with all other experience of the world, language opens up a completely new dimension, the profound dimension whence tradition comes down to the living. This has always been the true essence of hearing, even before the invention of writing, that the hearer may listen to the legends, the myths and the truth of the ancients.

¹² Ibid 134.

The literary transmission of tradition, as we know it, is nothing new, compared with this, but only changes the form and makes the task of real hearing more difficult.¹³

After reading Gadamer, one may never hear law talk about 'a hearing' in quite the same way as before. We might now do well to reread Harlan's *Cohen* opinion again (*Alienation). One could readily slip these sentences in the opinion: 'When you look at Cohen's vulgar slogan ['F*** the Draft'], you can also look away from it, by looking in another direction. Cohen did not vocalize his anger about the draft to you or me.'

* * *

In the late 1990s, a friend of mine was having great difficulties in her relationship with her parents. I suggested to her that she and her parents seek out formal relationship counseling. She agreed to this, and I became involved in organizing the process and participating in it. 'Echoing' was one of the first exercises that the counselor, Jim, asked us to do. When one of us communicated a thought or feeling to someone else, this someone else would then paraphrase what had been communicated and then ask for confirmation with this question: 'Am I understanding you well?' Jim directed us to a fragment from Harville Hendrix's *Getting the Love You Want* (1988) for a sense of how difficult the seemingly process of echoing can be.¹⁴ The fragment involves a conversation that took place at one of Hendrix's workshops. He asked a couple to volunteer to join him at the front of the group and talk about a sensitive issue, just as they would at home. Greg and Sheila, a young couple who had been living together for only a few months, volunteered:

Greg:

Sheila, I'm really bothered by your smoking, and I'd like you to be more considerate when you smoke around me.

Sheila:

You knew that I smoked when you asked me to live with you. You accepted that fact in the beginning. Why are you always so critical of me? You should accept me as I am. You know that I am trying to cut down.

¹³ H Gadamer, *Truth and Method* (1975) 420.

¹⁴ H Hendrix, *Getting the Love You Want: A Guide for Couples* (1988) 143-48. In the material quoted below, I have replaced the ocular metaphor 'mirroring' with an auditory metaphor.

Greg:

I acknowledge your efforts to smoke less. But I find it interesting that, when we come here and the sign in the dining room says 'No Smoking,' you follow it. Yet I feel invaded at home with the smell of tobacco smoke all over the place.

Sheila:

Well, this is not my home. And I feel I have a right to smoke in my own home!¹⁵

At this point of rights talk, which was laden with 'some force', 'there was a smattering of applause from the crowd.'¹⁶ What was the talk turning into? 'The score was love-fifteen.'¹⁷ It was time for Hendrix to referee.

Hendrix:

OK. Let's start this all over again and see if we can turn it into an exercise in communication, not confrontation. Greg, would you repeat your opening statement?

Greg:

I'm really glad that we're making a home together, but, with regard to your smoking, when we joined together I didn't realize how difficult it was going to be for me.

Hendrix:

OK. Now I would like you to simplify that statement so it will be easier to understand.

Greg:

Let's see. . . . Your smoking bothers me. I didn't think it would at first, but it does.

Hendrix:

Good. Now, Sheila, I want you to paraphrase Greg, trying to echo his feelings and thoughts without criticizing him or defending yourself. Then I want you to ask Greg if you have heard him correctly.

Sheila:

I'm truly sorry that my smoking interferes -

Hendrix:

No, I'm not asking you to apologize. Just echo back to Greg what he was saying, and show your understanding and acceptance of his feelings.

Sheila:

Could he possibly repeat himself?

Greg:

¹⁵ Ibid 144-45.

¹⁶ Ibid 145.

Your smoking bothers me. I didn't think it would at first, but it does.

Hendrix:

Now, try to feed that back to him with receptive warmth.

Sheila:

I think I'd rather stop smoking! (Group laughter.)

Hendrix:

Take a deep breath and be aware that he is experiencing some discomfort at one of your behaviors. Rather than hearing it as a criticism of your behavior, hear it with concern for his well-being. Whether it's justified or not, he is feeling uncomfortable, and you care about him. I know this is hard to do in front of a lot of people, and I know that this is an issue you feel strongly about.

Sheila:

What could be done –

Hendrix:

No, don't try to solve it. You just want to paraphrase his message and the emotional content behind it, so that he knows that you understand what he is feeling.

Sheila:

(Takes a deep breath.) OK. I think I get it now. I understand that it really bothers you that I smoke. You didn't realize how much it would bother you until we actually started living together. Now you are very troubled by it. Is that what you are saying?

Hendrix:

Excellent. I could hear Greg's concern reflected in your voice. Did that check out with you, Greg? Is she hearing what you have to say?

Greg:

Yes! That's just how I feel. What a relief! This is the first time she's ever really bothered to listen to me.¹⁸

In a commentary on the interchange Hendrix stresses that 'there is a tremendous satisfaction in simply being heard'.¹⁹ He believes that being heard in this way, 'is a rare phenomenon in most marriages.'²⁰ After demonstrating the exercise for workshop groups, Hendrix sends each couple to a room so that they can practice it. 'Invariably',

¹⁷ Ibid.

¹⁸ Ibid 145-46.

¹⁹ Ibid 146.

²⁰ Ibid 146-47.

he says, 'they return to the group reporting that it was a novel, exhilarating experience. It is such an unexpected luxury to have your partner's full attention.'²¹

The exercise, for me and for my friend and her parents, was indeed an 'exhilarating experience'. For me, it was the first step in learning a new language, the heart of which is 'agape',²² a Greek word for love. In Greek philosophy, agape is 'one of the forms of love on a continuum with eros and philia.'²³ It is 'a special way in which love is expressed.'²⁴ In *Getting the Love You Want* Hendrix uses the word to refer to 'the act of directing eros, the life energy, away from oneself and toward the welfare of the other.'²⁵ In a sense 'it is sacrificial, but what is sacrificed is not the self but preoccupation with the self.'²⁶ He continues:

Although it is used as a noun, and thus denotes an attitude, it is also used as a verb, and thus denotes the way one acts toward another. The merger of these two senses means that agape can be understood as an attitude that is expressed in behaviors. On this basis, I call it the 'power of transformation' that directs eros to the other, thus creating a new quality in relationships, called 'philia.'²⁷

After reading that passage, the title of Hendrix's book may well have a different ring to it – I initially thought it was a corny title and then came to a different judgment.

What is in an echo? What place might the echo have in legal education and in law? Our response to that question will in no small way depend upon what we consider to be the central aim of legal education and the important possibilities of law.

* * *

Whilst doing echoing exercises I was reminded of instances of poor listening by several contributors to the 'law and economics' movement, including Richard Posner, who arguably is one of White's least attuned critics. Some details are as follows.

²¹ Ibid 147.

²² Ibid 169.

²³ Ibid 289.

²⁴ Ibid 290.

²⁵ Ibid.

²⁶ Ibid .

²⁷ Ibid 289-90.

With the publication of his textbook *Economic Analysis of Law* (1972), Posner became a leading contributor to the movement known as Law and Economics. The following passage is taken from his opening chapter:

Economics is the science of human choice in a world in which resources are limited in relation to human wants. It explores and tests the implications of the assumption that man is a rational maximizer of his ends in life, his satisfactions – what we shall call his ‘self-interest.’ (Self-interest should not be confused with selfishness: the welfare of other people may be part of one’s satisfactions.)

It is implicit in the definition of man as a rational maximizer of his self-interest that people respond to incentives – that if you change a person’s surroundings so that he could increase his satisfactions by altering his behavior, most of the time he will do so. From the proposition that people’s behavior can be altered by changing their incentives we derive three fundamental economic concepts . . . [:] the inverse relationship between price and output, alternative or opportunity cost, and the tendency of resources to gravitate from lower valued to higher valued uses if voluntary exchange is permitted . . . [Concerning] [t]he third basic concept, . . . [:] Why did the manufacturer of lawn mowers pay more labor and materials than competing users of these resources? Assuming he is rational, it must be because he thought he could use the, to obtain a higher price for his finished good than could competing demanders. They were worth more to him. Why does farmer A offer to buy farmer B’s farm at a price higher than B’s minimum price for the property? Because the property is worth more to A than to B: meaning, A can use it to produce a more valuable output as measured by the prices that consumers are willing to pay. By a process of voluntary exchange, resources are shifted to those uses in which the value to the consumer, as measured by the consumer’s willingness to pay, is highest. When resources are being used where their value is greatest, we may say that they are being employed efficiently.

Despite the use of terms like ‘value’ and ‘efficiency,’ economics cannot tell us how society ought to be managed. Efficiency is a technical term: it means exploiting economic resources in such a way that human satisfaction as measured by aggregate consumer willingness to pay for goods and services is maximized. Value too is defined by willingness to pay. Willingness to pay is in turn a function of the existing distribution of income and wealth in the society. Were income and wealth distributed in a different pattern, the pattern of demands might also be different and efficiency would require a different deployment of our economic resources. The economist cannot tell us whether the existing distribution of income and wealth is just, although he may be able to tell us something about the costs of

altering it as well as about the distributive consequences of various policies. Nor can he tell us whether, assuming the existing distribution is just, consumer satisfaction should be the dominant value of society. The economist's competence in a discussion of the legal system is limited to predicting the effect of legal rules and arrangements on value and efficiency, in their strict technical senses, and on the existing distribution of income and wealth.²⁸

Without alerting his reader to his own process of choice, Posner has taken sides on a burning issue, namely the definition of economics. Those versed in the history of economic thought will know that the movement from 'political economy' to 'economics' was associated with a narrowing of the definition of economics. This narrowing went from something like 'the study of the social relations governing the production, distribution and exchange of wealth' to 'the science of choice'. The former is associated with an image of 'the economy' as not a thing but a process embedded within social institutions; the latter is associated with a 'core' of a 'discipline' in which people are assumed to be 'rational maximizers of their satisfactions', and that the 'principles' of economics are claimed to be 'deductions' from this assumption. The latter definition has formed the basis of what is referred to by some as 'economic imperialism': economics is the science of choice, and all of life (in all cultures) involves making choices; economics, then, can be applied to all areas of life. Posner is making an important choice, which he stays silent on. We will do well to judge not only his choice but also his silence.

Posner simply sidesteps pioneering works in law and economics, such as John Commons' *Legal Foundations of Capitalism* (1924), in which it is suggested that there is no distinct activity that can be simply called 'economic'. Posner avoids difficulties with the word 'economic' in part by avoiding questions about possible meanings of a number of words, including: 'choice', 'concept', 'cost', 'efficiency', 'interest', 'legal', 'maximizer', 'rational', 'resource', 'self', 'value', 'voluntary', and 'wealth'. *Legal Foundations of Capitalism* directs attention to possible meanings for many of those words and to the significance of particular choices on the way communities go about 'the proportioning ... of persuasive, coercive [and other] ... inducements ... to willing, unwilling and indifferent persons ... for purposes which the public and private participants deem to be, at the time, probably conducive to private, public or

²⁸ R A Posner, *Economic Analysis of Law* (1973) 1-5.

world benefit.²⁹ Commons left behind a rich language, a 'resource', to talk about the activity we call 'economic', talk that could render the ordinary extraordinary (*Alienation). He offers an image, centering on the legal hearing, of the economist as engaged in a literary activity, one which inescapably contributed to the evolution of our culture (*Activity). Posner's textbook has nothing to say about Commons' work, nor does it have anything to say about other approaches to the 'economic'. Our culture arguably is worse off for the silence, not the least because it contributes to the inapt image of language as merely a tool for pointing to objects 'out there' in the world. This inapt image has no meaningful place for the legal hearing, where a potentially rich and fascinating linguistic 'competition' takes place – story versus story.

Posner's imperialistic orientation is perhaps most readily discernable in his chapter 'The Unity of the Common Law'. He says, for example:

Our survey of the major common law fields suggests that the common law exhibits a deep unity that is economic in character. The differences among the law of property, the law of contracts, and the law of torts are primarily differences in vocabulary, detail, and specific subject matter rather than in method or policy. The common law method is to allocate responsibilities in such a way as to maximize the joint value, or, what amounts to the same thing, minimize the joint cost of the activities.³⁰

The reader may wonder whether it is plausible to attribute economic insight to common law judges, especially since litigants rarely couch their arguments in economic terms. However, the character of common law litigation forces a confrontation with economic issues. The typical common law case involves a dispute between two parties over which one should bear a loss. In searching for a reasonably objective and impartial standard, as the traditions of the bench require him to do, the judge can hardly fail to consider whether the loss was the product of wasteful, uneconomical resource use. In a culture of scarcity, this is an urgent, an inescapable question. And at least an approximation to the answer is in most cases reasonably accessible to intuition and common sense.³¹

Posner's reader may do well to wonder who she is becoming if she accepts without question his use of the word 'economic'. The character of his 'economic', to reuse his

²⁹ J R Commons, *Legal Foundations of Capitalism* (1924) 387-88.

³⁰ Posner, *op cit*, 98.

³¹ *Ibid* 99.

words, 'forces a confrontation with economic issues', for almost every human choice can be imagined as 'economic'. It may be that litigants rarely couch their arguments in 'economic' terms for the simple reason that they are addressing questions of justice concerning a loss of some kind. In doing so, whether they know it or not, they are contributing to a collective effort to *create* a 'common sense' in the face of conflicting common senses. We might do well to imagine Posner, in composing his book, to be contributing to the same collective effort, notwithstanding his suggestion that there exists out there an 'accessible . . . common sense'.

Posner's 'economic approach to law', as presented in his textbook and elsewhere, has generated a great deal of criticism. One work of worthy of attention here is Warren Samuels and Nicholas Mercuro's *Posnerian Law and Economics on the Bench* (1984), which echoes Commons' work on the legal foundations of capitalism.³² The authors engage with the first 120 opinions that Posner wrote after becoming, in 1981, a judge on the United States Court of Appeals for the Seventh Circuit. 'The purpose of this article', they say, 'is to explore those opinions, inquiring how Posner's brand of economic efficiency, namely wealth maximization, has entered those opinions and what they reveal as to the nature and limits of the wealth mazimization approach.'³³ They go on to say:

We want to make clear what we are not trying to do in this article. First, we are *not* going to either evaluate or interpret Posner's technical treatment of law, or his legal reasoning *qua* legal reasoning, in his opinions. Whether his (or the Court's) decisions 'correctly' follow precedent or 'correctly' interpret statutes and common law doctrines, is not something which we are qualified to evaluate or, for that matter, are here interested in evaluating. . . . Second, . . . we are not interested in arguing with either Posner's law or ethical philosophy and will consider them (their general presence) only insofar as is necessary to understand the role, nature and limits of wealth maximization as evident to us in his opinions. . . . We *are* interested in describing what insights can be drawn from Posner's writings on the bench, as evident to us in his judicial opinions, and their relationship to Posnerian law and economics, specifically his wealth maximization approach.³⁴

³² W J Samuels and N Mercuro, 'Posnerian Law and Economic on the Bench' (1984) 4 *International Review of Law and Economics* 107; reprinted in W J Samuels, *Essays on the Economic Role of Government* (1992) vol 2, ch 2, 60 (n 2).

³³ *Ibid* 39.

³⁴ *Ibid* 39-40.

We might say that Samuels and Mercuro are going to evaluate and interpret Posner's nominally 'economic' treatment of law – his economic reasoning *qua* economic reasoning. In doing so, they may be inviting their reader to question the nature of that to which the word 'legal' points.

Engaging with Posner largely on his own terms, Samuels and Mercuro question the workability of 'wealth maximization' as a coherent basis for making judgments:

Posner's analysis lacks explanatory substance and wealth maximization lacks feasible application because of a fundamental circularity problem. The point here is that wealth maximization requires and affects prices. However, an antecedent determination and specification of rights is first needed to establish the prices required to employ wealth maximization. Consequently it cannot be used to determine rights. Further, from this perspective, if one understands efficient or wealth maximizing results to be generated by rights, any rights configuration produced by the courts will lead to some maximizing result. There being no unique wealth maximizing result, it does not explain much to say that courts do, or for that matter ought to, facilitate specific wealth maximizing outcomes. Any, or substantially any, decision as to rights, particularly in the area of property law, will, through subsequent exchange, lead to an efficient or wealth maximizing result.³⁵

Samuels and Mercuro might have noted that the 'circularity problem' may not in fact be a 'problem' for some people. Robert Bork can be included here. Speaking of 'microeconomic theory' in *Judicial Precedent and the New Economics* (1984), '[t]he system is entirely circular, which is its strength because circular logic is not rebuttable.'³⁶ That claim could do with some rebutting, not the least for the purpose of inquiring into the purpose of 'microeconomic theory'. The inquiry might help us place the activity of being an economist in relation to that of a judge.

For Samuels and Mercuro, the 'most remarkable cases are those in which Posner argues that courts ought not to support or at least ought to severely restrict the appointment of counsel for prisoners.'³⁷ Posner's argument is that, if the prisoner has

³⁵ Ibid 38-39.

³⁶ R Bork, 'Judicial Precedent and the New Economics' in E Fox and J T Halverson (eds), *Antitrust Policy in Transition: The Convergence of Law and Economics* (1984) 16.

³⁷ Samuels and Mercuro, *op cit*, 57.

a 'good case', an attorney will 'gravitate towards him via the market.'³⁸ His argument is expressed in his dissenting opinion in *McKeever v Israel* (1982):

Encouraging the use of retained counsel thus provides a market test of the merits of the prisoner's claim. If it is a meritorious claim there will be money in it for a lawyer; if it is not it ought not to be forced on some hapless unpaid lawyer. . . . Thus . . . I believe there should be a presumption against appointing counsel in a prisoner's civil rights suit.³⁹

In the following year, the Seventh Circuit decided *Merritt v Faulkner* (1983), another case involving appointment of counsel. In a dissenting and concurring opinion, Posner elaborated upon his 'market test':

[A] prisoner who has a good damage suit should be able to hire a competent lawyer and . . . by making the prisoner go this route we subject the probable merit of his case to the test of the market. . . . If [the prisoner] cannot retain a lawyer on a contingent fee basis the natural inference to draw is that he does not have a good case.⁴⁰

What might appear 'natural' for Posner could well be artificial and problematic for others. Samuels and Mercuro have this to say about the two cases:

These cases are a perfect example of the limited probative reach of Posner's approach. Allowing markets to determine whether a prisoner can bring litigation is to let the prevailing law, especially the prevailing rights governing the distribution of property, govern the access to an attorney. What Posner neglects is the fact that the market alone will not determine the prisoner's rights. It is the pre-existing distribution of wealth and power (both a partial function of law) which governs the general prisoner access and also the array of alternative uses of lawyers' services. Posner's approach would allow market valuation via other uses for lawyers' services to determine litigation rights in a particular case, much as if legal services were just one more marketable commodity, such as tuna fish. Establishing a prisoner's right to counsel via the market can only be accomplished by accepting other rights and law which govern the flow of legal services. It is much more than wealth maximization.⁴¹

³⁸ For a comprehensive discussion of Posner's position, see J G Brown, 'Posner, Prisoners, and Pragmatism' (1992) 66 *Tulane Law Review* 1117.

³⁹ *McKeever v Israel*, 689 F2d 1315 (7th Cir. 1982), quoted in Samuels and Mercuro, op cit, 57.

⁴⁰ *Merritt v Faulkner*, 697 F2d 761 (7th Cir. 1983), quoted in Samuels and Mercuro, op cit, 57.

Samuels and Mercurio arguably do a good 'economic' service by constructively criticizing the problematic application of so-called economics to legal services. Their criticism can be imagined as 'economics' in the service not of power but of humankind. What would become of us if we fail to make the most basic distinctions, such as commodities and legal services? Would we not destroy a language, namely the language of the law, with another language, Posner's defective language of economics?

Posner commented on Samuels and Mercurio's article. At the outset he places the authors with these words:

Samuels and Mercurio, who are not lawyers, do not criticize my opinions; they disclaim emphatically any evaluative purpose. The opinions are merely the raw materials for analyzing how the idea of wealth-maximization functions in actual judicial opinions. The authors naturally expect that they will find a richer ore for this particular analysis if they look in my opinions than if they look in opinions of judges who had not, before coming judges, written extensively and approvingly of wealth maximization as a principle of justice, as I had done. I can comment on the issues raised in their article without getting into the merits of particular decisions in which I have been involved.⁴²

We should hesitate to accept the remark that Samuels and Mercurio 'do not criticize' Posner's opinions. They do criticize them in the sense that they direct attention to Posner's selective identification of costs and benefits in talking about rights, selectivity that renders the compass of 'wealth maximization' problematic.

Posner goes on to present his criterion of 'wealth maximization' with these words:

'Wealth maximization' as a guide to governmental including judicial action means that the goal of such action is to bring about the allocation of resources that makes the economic pie as large as possible, irrespective of the relative slices. It means in other words using cost-benefit analysis as the criterion of social choice, where the costs and benefits are measured by the prices that the economic market places on them, or would place on them if the market could be made to work.⁴³

⁴¹ Samuels and Mercurio, op cit, 57-58.

⁴² R A Posner, 'Wealth Maximization and Judicial Decision-Making' (1984) 4 *International Review of Law and Economics* 131.

⁴³ Ibid 132.

What are we to make of the 'pie' metaphor? Is this not an attempt to reinforce the image of the world in which there is a distinctively 'economic' entity out there. What, we might ask, is 'the market'? Posner is offering his reader an image of a thing, which is seemingly disconnected from 'governmental including judicial action'. We surely will do well to imagine Posner's image as exactly that, an image, which is not independent of our respective images of his image (*Image).

Posner fails to engage with several fundamental points made by Samuels and Mercurio. In a reply to his comment, Samuels and Mercurio write:

Posner . . . believes that as a judge he is maximizing wealth on the basis of market prices, and doing so without coercion, the market prices existing independently of his judicial choices. He believes this because he is persuaded that 'Courts can do very little to affect the distribution of wealth in a society . . . ' and that wealth maximization 'is the only such value (at least if all other social values can be grouped under the distributional rubric) that courts can do much to promote.' . . . Posner, in a word, is wrong. . . . [C]ourts—judges—necessarily make choices as to whose interests are to be promoted and whose are to be restrained or inhibited. When judges engage in balancing, or in their cost-benefit comparisons, they do not just identify preexisting prices (underlying the cost and benefit calculations) and decide on that basis. They help determine the rights on which future costs and benefits rest. They are inextricably involved in making distributional choices. They do this through identifying and weighing the costs and benefits they consider. They do this through determining whose interests will and will not count, and how much. Some of their determination is more or less clearly constrained by the Constitution and by other, higher judges. But all courts make choices between interests and in the process reach distributional results. . . .

What is absent from Posner's response to our article is any explicit consideration of the circularity argument. That argument is that wealth maximization requires an antecedent determination of rights; that one cannot use prices to determine rights without giving effect to some implicit determination as to whose interest count as rights. . . . The circularity problem is resolved in practice only through the selective perception and other choices necessarily engaged in by judges; that is why we have and pay them. If Posner were both fully conscious of and candid about what he is doing as a judge—something which,

admittedly, his philosophy may deter—he would recognize this. But, then, outsiders are not directly involved in legitimizing court decisions.⁴⁴

These ‘outsiders’ seem to know more about fundamental aspects of ‘the law’ than the insider whom they criticize. Samuels and Mercuro help direct attention to the inescapable task of the law, the pursuit of justice, not the least in the activity of ‘legitimizing court decisions’. This activity is not and cannot be mechanical, and it should not be given a mechanistic image, if only to avoid the ‘outsiders’ being imagined as outside of ‘the people’.

Posner did not respond to Samuels and Mercuro’s reply. This seems unfortunate, for doing so may have brought about some form of shift in the way one or more of the parties imagine the law, a shift that could then become a topic for conversation, if only to be placed in ‘law and literature’ talk.

What might have become of the *International Review of Law and Economics* if, at the time Posner sent in his comment on Samuels and Mercuro’s article, its editor had just read Harville Henrix? ‘OK. Let’s start this over again and see if we can turn it into an exercise in communication, not win-rhetoric. Dick, would you echo their early statement on the circularity problem?’

* * *

The echoing exercise could have enabled Posner to get into a position in which he could tune in to White’s *The Legal Imagination*, which, incidentally, was published a year after Posner’s *Economic Analysis of Law* – Little, Brown and Company published both course books. Let us turn to an important introductory remark in White’s book concerning the wide range of readings:

As you look at the readings, you will notice that in selecting them I have drawn heavily from my own reading of literature. Of course I hope that others will find this material and the lines of thought to which it gives rise of interest, but my purpose is not to claim that a literary education is the only one for a lawyer or for this course: it is to establish a way of looking at the law from the outside, a way of comparing it with other forms of literary and intellectual activity, a way of defining the legal imagination by comparing it with others. The non-legal

⁴⁴ W J Samuels and N Mercuro, ‘Wealth Maximization and Judicial Decision-Making: The Issues Further

readings are meant to give us a common sense (if an incomplete one) of what legal literature leaves out, of what others do that the law does not, and to define a context out of which judgments can begin to be drawn and against which they can be tested. In the notes and questions I bring to both sorts of literature some of the concerns of the literary critic, but I hope I do so in a way that the general reader can easily follow.⁴⁵

In the spirit of Hendrix: Jim, your purpose is to create a place (one that cavorts with the inside/outside distinction) from which to imagine the activity we call the law, an activity that you would call 'literary'. Am I understanding you well?

There is a sense in which White has been done an injustice by those who have labeled him as a pioneer of 'law and literature'. Consider, for example, these words from the opening of Posner's *Law and Literature* (1988):

The field is not completely new. In the nineteenth century, English lawyers wrote about the depiction of the legal system by Shakespeare, Dickens, and other famous writers. Wigmore thought lawyers should read the great writers to learn about human nature, and Cardozo analyzed the literary style of judicial opinions. But it is only since the publication in 1973 of James Boyd White's *The Legal Imagination*, a book that audaciously claims that a study of literature should be a part of legal education, that a distinct, self-conscious field of law and literature can be said to have emerged.⁴⁶

Posner has simply failed to read White carefully, for White made no such 'claims'. Posner's inapt territorial 'field' metaphor can readily deafen us not only to White's claims about law as a 'literary' activity but also to his efforts to transform our sense of law by putting it together with something else – that is, to imagine law as a compositional art.

OK. Dick, let's start this all over again and see if we can turn it into an exercise in communication, not win-rhetoric. The activity of echoing Jim may help you, Dick, to avoid marginalizing that which you call 'literature'.

Clarified' (1986) 6 *International Review of Law and Economics* (1986) 133, 134-35.

⁴⁵ *The Legal Imagination* xx.

⁴⁶ R A Posner, *Law and Literature: A Misunderstood Relation* (1988) 12 (references omitted).

Metaphor

'Is all language metaphorical in all its uses, or does it make sense to isolate a certain activity or event and call that metaphor?' That question comes from an assignment at the end of White's *The Legal Imagination*.¹ This entry may be taken as a response to it.

* * *

Why would a lawyer want to pay any attention to White's 'literary' question? Michael Boudin, a former colleague of White's,² gives a fairly direct answer in *Antitrust Doctrine and the Sway of Metaphor* (1986):

My thesis is that in several different roles, metaphor is of practical importance to legal doctrine beyond mere decoration. . . . It is natural to be skeptical of the notion that metaphor, primarily a literary device, can mold antitrust doctrine and affect judicial judgments condemning a trade association or disallowing a merger. To the casual observer, a metaphorical phrase in a legal opinion will appear to be only a poetic adornment. Yet metaphor, to borrow one of the most famous images in economics, is often a kind of 'invisible hand' that guides events from afar without detection.'³

Boudin's 'thesis' lends support to White's thesis that the activity of being a lawyer is an enterprise of the imagination. Boudin's reader might develop a sharper auditory imagination for detecting inapt metaphors, especially those that are so embedded in our culture that they seem 'natural'.

After reading Boudin it might be natural to be skeptical toward those who would resist his thesis. Richard Posner immediately comes to mind. His *Law and Literature* (1988) attempts 'a general survey and evaluation of the field of law and literature'.⁴ What's in a 'survey' of a 'field'? Did he consider *engaging* in a discourse that

¹ *The Legal Imagination* 956.

² Ibid xxi. 'My best teachers in the law have been my colleagues on the *Harvard Law Review*, especially Michael Boudin'.

³ M Boudin, 'Antitrust Doctrine and the Sway of Metaphor' (1986) 75 *Georgetown Law Journal* 395, 395-6.

transcends boundaries? At the outset of his book, he eliminates the 'superficial or misleading . . . potential links between law and literature'.⁵ Concerning the figurative:

Sometimes the lawyer or judge uses figurative language in the approximate sense in which it is used in literature, and then he comes within my sights in this book. Michael Boudin, in this respect the heir of Jeremy Bentham, points out that metaphorical language in law is often a source of obfuscation. A judge says, for example, that pricing is 'the central nervous system of the economy,' and the literal-minded lawyers begin thinking about anti-trust law in terms of inappropriate medical analogies. The metaphor elides the reasoning process that might indicate both the aptness and the limits of the analogy that the metaphor (a compressed analogy) conveys. Reading imaginative literature, we are on guard against taking literally what the writer says; we are protected by the expectations that we bring to such work. We are not so well prepared to discount figurative language in discursive, analytic prose.⁶

Posner's reader might do well to attend to her (or his) own 'expectations' that she brings to *Law and Literature*. Doing so may change what 'comes within [her] sights'. She might be inclined to ask this: Why did Posner fail to engage with Boudin's thesis, especially to the extent that it overlaps White's claim about law being a literary activity (law *as* literature, not law *and* literature)?

* * *

The word 'metaphor' has Greek roots, coming from *meta* (across) and *phor* (carry); it is commonly used in reference to the transfer of meaning from one term to another, and made identical to something 'alien' to itself.⁷ This movement is often described in such terms as 'a trespass across boundary lines' – improperly mixing the inside and

⁴ R Posner, *Law and Literature: A Misunderstood Relation* (1988) x.

⁵ Ibid 3.

⁶ Ibid 3-4 (footnote omitted).

⁷ In talk about language it has long been common to make a distinction between literal and figurative. In *The Arte of English Poesie* (1589; 1970), George Puttenham made the distinction with these words:

As figures be the instruments of ornament in every language, so be they also in a sort of abuses or rather trespasses in speech, because they pass the ordinary limits of common utterance, and be occupied of purpose to deceive the ear and also the mind, drawing it from plainness and simplicity to a certain doubleness, whereby our talk is the more guileful and abusing, for what else is your *Metaphor* but an inversion of sense by transport; your *allegory* but a duplicity of meaning or dissimulation under covert and dark intendments . . . ? (154; spelling modernized)

the outside.⁸ The term 'metaphor' suggests a conveying that parallels 'translation', a term that has Latin roots, coming from *trans* (across) and *latus* (carry). Both terms, as White points out in *Justice as Translation*,⁹ suggest an act of transportation from one location to another, a suggestion that invites one to imagine 'meaning' to be an object that can readily be relocated. This is a sense of 'meaning' that White seeks to resist (*Rhetoric).¹⁰ 'Metaphor' and 'translation' are clumsy metaphors.

* * *

Much is at stake, for lawyers and nonlawyers alike, in the way we imagine metaphor, as suggested in Henk Botha's *Metaphoric Reasoning and Transformative Constitutionalism* (2002-03).¹¹ He accepts claims by various scholars that all our reasoning is metaphoric in structure – that it is not possible to avoid metaphors. His central claim is this: 'that the reflective use of metaphors can help South African lawyers to break with the essentialism and reductionism of apartheid legal thought, transform legal theory and practice, and imagine more humane futures.'¹² What he calls 'essentialism and reductionism' flows from a tradition that he traces through leading philosophers of modern Western civilization, including Thomas Hobbes and John Locke. Central to this tradition is the 'conduit' metaphor. Locke, in *An Essay Concerning Human Understanding* (1671), described language as 'the common conduit whereby the improvements of knowledge are conveyed from one man and one

Puttenham here suggests that there is a corpus of 'plain', literal language that can be distinguished from 'ornament[al]', figurative language, which engages 'in a sort of abuses or rather trespasses'.

⁸ M Kilgour, *From Communion to Cannibalism: An Anatomy of Metaphors of Incorporation* (1990) 12.

⁹ *Justice as Translation* 233-35.

¹⁰ A connection can be made here with the Italian humanistic tradition. A significant name here is Giambattista Vico. For a discussion of his work, see E Grassi, *Rhetoric as Philosophy: The Humanist Tradition* (1980). Grassi's approach to metaphor is associated with his own efforts to contribute to the rehabilitation of rhetoric. White, in *Hercules' Bow*, identifies Grassi's book as offering 'a general view of rhetoric rather similar to my own' (48). Grassi questions those who imagine themselves as avoiding metaphor and privileging deductive reasoning from 'first principles':

Surprisingly enough, perhaps, we can speak about first principles only through metaphors; we speak of them as 'premises,' as 'grounds,' as 'foundations,' as axioms. Even logical language must resort to metaphors, involving a transpositions from the empirical realm of the senses, in which 'seeing' and the 'pictorial' move to the foreground: the 'clarify,' to 'gain insight,' to 'found,' to 'conclude,' to 'deduce.' We also must not forget that the term 'metaphor' is itself a metaphor; it is derived from the verb *metapherein* 'to transfer,' which originally described a concrete activity. (33)

'The Herculean act', for Grassi, 'is always a metaphorical one and every genuine metaphor is in this sense Herculean work' (7).

¹¹ H Botha, 'Metaphoric Reasoning and Transformative Constitutionalism (part 1)' (2002) *Journal of South African Law* 612; 'Metaphoric Reasoning and Transformative Constitutionalism (part 2)' (2003) *Journal of South African Law* 20.

generation to another.’¹³ ‘The conduit metaphor’, writes Botha, ‘structures our understanding of ideas, language and communication.’¹⁴ Specifically:

It presents ideas as objects, linguistic expressions as containers, and communication as sending. On this understanding, a writer or speaker puts ideas (objects) into words or expressions (containers), and sends them (along a conduit) to a reader or listener who extracts the ideas from the words. This metaphor is pervasive. For instance, we attempt to *capture* our *ideas* in *words*, and tell students to try to *pack* more *thoughts* into fewer *words*. We sometimes find it difficult to *get* our *thoughts* *across*, or complain that a speaker has not *given* us any *idea* of what she means.¹⁵

The fundamental image here is that of the machine: language is a tool for pointing to ‘objects’ in the world, and writers and readers mechanistically connect objects with words, which can move from one person to another like articles on a conveyer belt.

The mechanistic imagery has significant ethical and political consequences. ‘The conduit metaphor’, Botha stresses, ‘trivialises the role of the reader or listener in the construction of meaning.’¹⁶ The reader or listener is defined as a passive receiver of information: ‘All the reader/listener has to do is to receive and unwrap the package containing the message.’¹⁷ The meaning of a message, however, is not an object that is external to us but an experiential process. Meaningful talk about ‘meaning’ thus needs to consider the ‘feelings or presuppositions’ of the interpreter, not the least in her efforts ‘to reconstruct the context in which the words were uttered’.¹⁸ For him, we will do well to attend to ways in which ‘the conduit metaphor . . . tricks us into believing that communication is relatively easy’: it downplays ‘that constant hard work that is required to make shared meaning possible.’¹⁹ This ‘hard work’ involves the writer and the reader trying to step into one another’s shoes. That which he calls ‘shared meaning’ is the product of a collaborative enterprise between reader and writer.

¹² Ibid (part 1) 613.

¹³ J Locke, *An Essay Concerning Human Understanding* (1671; 1962) 106.

¹⁴ Botha, op cit (part 1), 618.

¹⁵ Ibid 618-19.

¹⁶ Ibid 621.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

For Botha, it is false to imagine that language can be cleansed of metaphor in the service of perfect communication about an 'objective reality'. A shared reality, for him, is the product of the metaphorical imagination, which is central to the process of familiarizing the strange and of estranging the familiar. 'The challenge', he argues, 'is to use metaphors reflectively and imaginatively':

In the first place, we need to be conscious of the metaphoric nature of our reasoning. We need to think of legal categories as imaginative constructs that are rooted in particular (physical, social and historical) experiences, and abandon the objectivist myth that they correspond to an objective reality. Secondly, we should scrutinise our metaphors in order to develop a critical understanding of the realities enabled by them. We should be aware of the politics of representation; of the ways in which metaphors can be used to legitimate the *status quo*, normalise violence, or contest power. Thirdly, we need to remind ourselves that the realities enabled by our metaphors do not exhaust the possibilities that are open to us. Other metaphors are likely to enable other realities. The supposed inevitability of our current social arrangements does not reflect objective necessity, but a failure of imagination. We must strive to enable different realities through the self-conscious use of multiple metaphors; we must challenge orthodox beliefs through the creative use of existing metaphors and the invention of new ones.²⁰

For Botha, 'a failure of the imagination' can be intimately associated with injustice. The architects and maintainers of the apartheid order, we can be sure, would have had us believe that there is only one way to conceive of reality. And there can be only one way to talk about this reality – namely, monologue.

For Botha, at the heart of a transformative constitutionalism must be 'dialogue'. Botha's point of departure for turning to dialogue is rights talk. He resists metaphoric containers and boundaries in favour of an image of interconnectedness:

If rights are conceived not as fixed boundaries, but as relationship, their content and limits must be subject to debate. Rights, in this view, are not prepolitical, but are shaped through political and legal discourse. Rights are not inimical to the democratic process, but provide us with a vocabulary to discuss matters of common concern. . . . The rights as dialogue metaphor . . . emphasises the shifting nature of our understanding of rights. In terms of this

²⁰ Ibid 623.

metaphor, the content, reach and permissible limitations of rights are determined through an ongoing process of public dialogue. . . . By conceiving rights as dialogue, we declare our readiness to listen to other viewpoints, to enter into discussion over our own beliefs, to open ourselves to the possibility of a dialogic modulation of deeply held convictions and prejudices. We commit ourselves to the idea of a public sphere that is characterized by openness, equality and plurality, and the transformation of institutions that do not fully embrace these values.²¹

The give-and-take of dialogue was to a very large degree missing in the apartheid order, the core of which was the metaphor of the boundary, used in the service of excluding and silencing voices. A move away from the culture of apartheid can be imagined as the displacement of one central metaphor by another.

* * *

The 1993 'interim' Constitution is a major landmark in the early efforts to break away from the apartheid regime. The opening of its epilogue, which is titled 'National Unity and Reconciliation', helps place the document within the larger cultural and political context in which it was written:

This Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.²²

That fragment was not included in the 1996 final Constitution, but the figure of the 'bridge' has been influential in expression about it.

Some of this expression draws from Etienne Mureinik's *A Bridge to Where?* (1994).²³ 'If this bridge is successfully to span the open sewer of violent and contentious transition,' he claims, 'those who are entrusted with its upkeep will need to understand very clearly what it is a bridge from, and what a bridge to.'²⁴ For

²¹ Botha, op cit (part 2), 24-5.

²² Constitution of the Republic of South Africa Act 200 of 1993.

²³ E Mureinik. 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

²⁴ Ibid.

Mureinik, the 'from'/'to' movement is this: from 'a culture of ... apartheid ... coercion' to 'a culture of justification ... built on persuasion'.²⁵ Let him elaborate:

What the bridge is from is a culture of authority. Legally, the apartheid order rested on the doctrine of Parliamentary sovereignty. Universally, that doctrine teaches that what Parliament says is law, without the need to offer justification to the courts. In South Africa, since Parliament was elected only by a minority, the doctrine taught also that what Parliament said was law, without a need to justify even to those governed by the law. The effect of these teachings, at the apogee of apartheid, was to foster an ethic of obedience. ... If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.²⁶

Mureinik here suggestively gives life to the fundamental 'persuasion'/'coercion' distinction, which would seem to be an important resource for distinguishing between governments that are and are not worthy of respect. This distinction might be thought of as overlapping that of the authoritative versus the authoritarian, with the former being legitimate and the latter being illegitimate.²⁷

Whilst the figure of the 'bridge' aptly suggests a departure from the apartheid regime, some caution with it may well be of great value. André van der Walt, in *Dancing with Codes* (2001), has warned against a simple reading in which there is a 'linear progression, a journey from one place to another'.²⁸ In doing so, he sought to contribute to talk about 'transformative constitutionalism':

²⁵ Ibid 32. Mureinik's phrase 'a culture of justification' has been kept alive in various contexts. See, for example, H Corder, 'Administrative Justice: A Cornerstone of South Africa's Democracy' (1998) 14 *South African Journal on Human Rights* 38, 58; S Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana Law Journal* 819, 843; D Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (2006) 224; M Liston, "'Alert, alive and sensitive": Baker, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law' in D Dyzenhaus (ed), *The Unity of Public Law* (2004) 113, 114; Rt Hon Lord Wolf, J Jowell, A Le Sueur, *De Smith's Judicial Review* (2007, 6th ed) 544.

²⁶ Mureinik, op cit, 32.

²⁷ The distinction draws from J Vining, *The Authoritative and the Authoritarian* (1986).

²⁸ A J van der Walt, 'Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State' (2001) 118 *South African Law Journal* 258, 259.

The value of the move from A(apartheid) across the B(ridge) to C(constitutionalism) is . . . in the perception that being in one place is better than being in another. The assumption is that apartheid is a place, a position, and that constitutional democracy is another place, a different position, the two being separated by the divide of transition from the one to the other. This places a static . . . view on the notion of transformation, in that it privileges certain value choices. More or less uncontroversially, it privileges one *place or position* over another (constitutional democracy over authoritarianism), and one *transformation process* over another (peaceful and constitutional transition over violent revolutionary change), but it also privileges other, less obvious and more controversial value choices: a preference for eventual stability over continuous change (position is more important than movement); a linear vision over a more complex vision of the history of the transition from apartheid to constitutional democracy (transition is a linear movement from A across B to C, and will end once we reach C); . . . and a spatial, position-orientated and thus strictly past/present, outside/inside, absent/present vision over a more complex vision of the relationship between pre-1994 and post 1994 law and jurisprudence in the transition.²⁹

Van der Walt here directs attention to different ways of imagining processes of 'transformation'. One way is 'linear movement', which is built on the assumption that there can be a choice between 'eventual stability' and 'continuous change' and that there exists a bright line between 'past' and 'present', and between 'outside' and 'inside'. Another way is a 'more complex' movement that renders problematic that assumption. For Van der Walt, we may take it, rejecting the assumption is a point of departure for earnestly engaging in 'transformative constitutionalism'.

In offering a 'more complex' image, Van der Walt draws from Robert Cover's work, which has bridge imagery at its heart.³⁰ Cover's metaphoric bridges are concerned with connecting not so much positions across space but moments in time. For Cover, our individual and collective pasts and futures are intertwined in a manner that negates any sense of a sharp distinction among them. Put in the context of modern

²⁹ Ibid 294-95.

³⁰ See, for example, R M Cover, 'The Supreme Court, 1982 Term – Foreword: *Nomos* and Narrative' (1983) 97 *Harvard Law Review* 1, 9: 'Law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative – that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative.' See also R M Cover, 'The Folktales of Justice: Tales of Jurisdiction' (1985) 14 *Capital University Law Review* 179, 181: 'Law . . . is the bridge—the committed social behavior which constitutes the way a group of people will attempt to get from here to there' (181). (Both of these essays have been reproduced in M Minow et alia (eds), *Narrative*,

South Africa, it is a 'fallacy . . . to think that we can rid ourselves of the legacy of the past as easily as crossing a bridge, leaving our accepted version of the past (and the possibility of other versions) behind us decisively.'³¹ In particular:

The legacy of apartheid land law remains with us even after the transformation to constitutional democracy. For one thing, the inequalities and inequities of the past, the unequal distribution of land and housing and other resources, will continue to affect social and legal relations as long as the balance of social and political power remains unequal. The Constitution makes it clear that the 'Abracadabra' vision of socio-economic transformation is nonsense – we have to deal with the legacy of the past more substantively and continuously. Secondly, . . . the ghost of apartheid land law will also stay with us as long as the dominant Roman-Dutch common-law vision of private property as a superior, exclusive and absolute right continues to influence the nature and balance of property holdings. Moreover, we cannot leave the legacy of struggle jurisprudence behind us either: the ghost of apartheid land law will also stay with us as long as transformation jurisprudence remains locked in the confrontational mode of demanding justice from the apartheid structures and hence feeding off its continued presence, even long after political power has changed hands. In all of these ways the codes of apartheid law still haunt us and restrict the futures we can imagine.³²

South Africans have inherited not only property arrangements but also ways of imagining these arrangements that support the institutionalized inequality of the past. To imagine the bridge metaphor as a simple tool for one-way movement from A(partheid) to C(onstitutionalism) is to direct attention away from this inheritance. The inattention may be attractive for some people, but we can be sure that 'the ghost of apartheid law' will continue to dwell.

That the 'ghost' could 'restrict the futures we can imagine' is a problem echoing the concerns of Cover. Van der Walt puts it this way:

In Cover's view of law and society an essential element of our normative universe is 'alterity', the images and propositions of the other possibility, the imagining of a different state of affairs than the present prevailing one. It should be easy, so soon after the end of the

Violence, and the Law: The Essays of Robert Cover (1993).) For a helpful discussion of Cover's work in relation to bridges, see A Soifer, 'Covered Bridges' (2005) 17 *Yale Journal of Law & the Humanities* 55.

³¹ Van der Walt, *op cit*, 296.

³² *Ibid* 296-97 (footnote omitted).

struggle against apartheid, to remember what it was like to imagine that things can be different – after all, a source of the energy during the struggle was the belief that things could be different, that protest action could articulate other options for meaningful change. However, now that the first big steps of transformation have been taken, the danger is that we might become complacent. The extent to which we subscribe to the linear evolutionary interpretation of the bridge metaphor would be an indication of the complacency, in that we think we know where we are and where we want to be, and only need the constitutional process of transition to get us there. In this vision of transformation there is no longer room for imagining that things could be different, that there might be further options and more complex alternatives to the places between which we have chosen to choose.³³

In short, the A B C approach to transformative constitutionalism is deeply problematic. We can be sure that the reading of the bridge metaphor as a linear journey will serve as a significant impediment to the achievement of some worthy ideals. Van der Walt is calling for a basic disposition that embraces ambiguity and uncertainty, a disposition that does *not* crave to ‘think we know where we are and where we want to be’.

* * *

This disposition will be familiar to a reader of *The Legal Imagination*, throughout which much is said on the topic of metaphor. For example, in an expression of dissatisfaction with talk about that which we call ‘the mind’, he writes:

The language of the Model Penal Code and the M’Naghten rule seems hopelessly mechanical and false: it pretends that we each have a ‘capacity to appreciate wrongfulness’ which can be found to be impaired or in good working order, like a carburetor or typewriter. The basic metaphor is that of a machine: the mind has certain functions – cognition, volition, self-integration, and so on – which can be found to be either in whack or out of whack. . . . What other metaphors or other models or theoretical constructs of the mind do you know? . . . You might make a list of other systematic ways of talking about the mind (especially if you have training in psychology) and identify the key terms in each. . . . What fundamental metaphors can you uncover? The languages of psychology are so familiar that it may seem strange to be asked to regard them as metaphorical rather than as plain description, but I think it is true that any such language is an invented one, rooted in an act of the imagination.

³³ Ibid 296.

What new psychological languages – what metaphors – can you invent: the mind is like a flower, like the ocean, like a snail?³⁴

With those questions, White's invites a movement from the 'familiar', namely the language that his reader in-habits, to the 'strange', where she or he renders that language the object of critical examination. In the challenge of having to 'invent' metaphors, White's reader is being asked to bring home, to make familiar, that which has become strange (*Alienation). This movement is at the heart of a course in which White offers an 'experience in the collapse of language under strain'³⁵ (*Experience).

In a section 'Is the Judge Really a Poet?', after reproducing material from Frost on poetry and metaphor, White asks: 'Can it be said of the judicial opinion (as Frost says of the poem) that it is metaphor, "saying one thing and meaning another, saying one thing in terms of another"? Is it "simply made of metaphor"?'³⁶ To assist with that question, White offers these remarks:

What is to the parties a ballroom fight, a dreadful auto accident, or an unsuccessful deal, is spoken of by the lawyers and the courts in terms of other things: cases, statutes, familiar arguments, and so on, and all in the traditional forms of oral and written argument, negotiation, judicial opinion, and the like. This is a way of talking of one thing in terms of another, of life in terms of law, and it could be seen as the central judicial activity. The events – which could be described in ordinary English a thousand ways, and which have a real life of their own outside the law in people's memories and feelings – are converted into a legal matter, and this conversion or metamorphosis is an act of the imagination. There are necessarily at least two languages here, two ways of talking; and in the judge's opinion, as in the poet's metaphor, the life of the expression comes in part from an initial tension, an incompatibility, between them. This tension creates a need that the conversion meets and fulfills. And since every case is different – presenting different material for a different conversion, subject to different strains and tensions – the judge's eye must be for the unique and the particular, his imagination must be always ready to deal with this case as a fresh one to be worked through on its own terms. It might indeed be said that every opinion is a 'new metaphor inside or it is nothing.'³⁷

³⁴ Ibid 328-29.

³⁵ Ibid 760.

³⁶ Ibid 773.

³⁷ Ibid.

For White, metaphor is at the heart of the law, which can be imagined as ‘a culture of conversion’³⁸ (*Image). He would have his reader imagine ‘metaphor’ as a term of integration (*Integration); it unites poetry and law; it is a vehicle for trying to understand partially what cannot be understood fully, namely events (such as ‘a ballroom fight’ and ‘a dreadful auto accident’) and ‘feelings’ and practices (‘law’).

In a section ‘Making a Language of Judicial Criticism’, a central example for analysis is the United States Supreme Court case *Griswold v Connecticut*. In this case the majority of the Court held unconstitutional a Connecticut statute of 1879 that prohibited the use of birth control devices, even by married couples. There were four opinions for the majority position (Justice Douglas for the Court, Justices Goldberg, Harlan, and White concurring) and two dissenting opinions (Justices Black and Stewart). The opinions differ significantly in method and voice, and thus they provide excellent material for White’s reader to sharpen her or his ear for metaphor. Some of White’s questions, which follow the opinions, are as follows:

How can you describe what you see these judges doing? What metaphors do you use, and what are their implications?

How would you yourself decide this case? What opinion would you write in justification and explanation? How would you describe what you have done?

What language of judgment and description have you employed in responding to these questions? What metaphors have you used, and what are their implications?

Now examine the language used by each Justice to explain why he favors one result or another: constitutional ‘guarantees’ have ‘penumbras’ formed by ‘emanations’ that create ‘zones of privacy’; the Bill of Rights, or ‘some’ of them, are, or are not, ‘incorporated’ in the Fourteenth Amendment; the Bill of Rights ‘enumerates’ specific rights, but the Ninth Amendment establishes ‘more’; . . . and Justice Stewart looks over the Bill of Rights and says ‘I can find nothing in them’ to invalidate this law. . . .

- a. How do these languages define the judicial process? As a rational one?
- b. Why do the Justices and their bright young clerks not simply tell us what they are doing in plain and direct speech, instead of talking in these sloppy metaphors?

What are some traditional ways of describing the judicial opinion, and how adequate are they? . . . One metaphor sometimes used in talking about judicial opinions is 'completeness.' The 'perfect' opinion includes all 'relevant' arguments and considerations. It is a logical whole. What is more, each argument or consideration must be given just the proper place and force: it is not enough to have all the pieces, they must be arranged properly. So what is it: a machine? A jigsaw puzzle?³⁹

After an engagement with those questions it would seem to me to be *almost* impossible to imagine that metaphor can have at best a mere decorative role in legal discourse and that being 'rational' is the opposite of being imaginative. The judicial process is not and cannot be a 'rational' one in the sense that it is grounded on the thinking-as-seeing metaphor.

Let us attend to fragments from three of the opinions. For the Court, Justice Douglas turned to the Bill of Rights, most of which had then been 'incorporated' in the Fourteenth Amendment. The Court previously had affirmed the unwritten right 'to educate one's children as one chooses', 'to read', and 'to teach'. In *Griswold*, the Court demonstrated a willingness to explicitly justify the practice of giving such non-enumerated rights with constitutional status:

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. . . .

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. . . .

We deal with a right of privacy older than the Bill of Rights - older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. . . .⁴⁰

³⁸ G A Kalscheur, 'Law School as a Culture of Conversion: Re-imagining Legal Education as a Process of Conversion to the Demands of Authentic Conversation' (1996) 28 *Loyola University Chicago Law Journal* 333.

³⁹ *The Legal Imagination* 722-23.

⁴⁰ *Ibid* 715-16.

'Penumbras' formed by 'emanations'? 'Douglas's imaginative phraseology has been the subject of much hilarity among conservative jurists,' according to Harry Jaffa.⁴¹ Such critics may well be inclined to place the imagination in opposition to reason, which is likely to be 'grounded' in vision: 'Look over the Constitution and you find no such right. Hold it up to the light, read it backwards in the mirror – still nothing.'⁴² But why should one give privileged standing to vision? Concerning the use of 'emanations', we perhaps should not be surprised that Black was the son of a Protestant preacher.⁴³

Justice Harlan concurred, agreeing with the reversal, but not with the reasoning. He considered the asserted link between the Fourteenth Amendment and the Bill of Rights to be problematic:

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty,' . . . For reasons stated at length in my dissenting opinion in *Poe v. Ullman, supra*, I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

Judicial self-restraint will not, I suggest, be brought about in the 'due process' area by the historically unfounded incorporation formula long advanced by my Brother Black, and now in part espoused by my brother Stewart. It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.⁴⁴

Echoing his opinion in *Poe*, Harlan gives 'tradition' a vital place in the activity of reading the Constitution. In doing so, Harlan complicates the basic orientational metaphors, such as inside versus outside and under ('underlie') versus over

⁴¹ Quoted in D J Glancy, 'Douglas's Right of Privacy: A Response to His Critics' in S L Wasby (ed), *He Shall Not Pass This Way Again': The Legacy of Justice William O. Douglas* (1984) 155, 160.

⁴² D D'Souza, 'The New Liberal Censorship' (1986) 38 *Policy Review* 8, 13.

⁴³ For a discussion of the religious associations with 'emanations' and their connections with Douglas, see R R Garet, 'Gnostic Due Process' (1995) 7 *Yale Journal of Law & the Humanities* 97.

⁴⁴ *Ibid* 717.

(*Rationality). This complication makes a meaningful place for authentic, non-linear transformative constitutionalism.

Justice Black, in dissent, expressed disdain for the statute, but denied that it was unconstitutional:

I feel constrained to add that [this Connecticut] law is every bit as offensive to me as it is to my Brethren of the majority There is no single one of the graphic and eloquent structures and criticisms fired at the policy of the Connecticut law . . . to which I cannot subscribe – except their conclusion that the evil qualities they see in the law make it unconstitutional.

The Court talks about a constitutional ‘right of privacy’ as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the ‘privacy’ of individuals. But there is not.⁴⁵

Here we have an example of ‘black letter’ law, to use a well-worn visual metaphor. (Black is said to have carried the text of the Constitution with him in his pocket, so that he could refer to its language as needed.⁴⁶) But, to repeat, why should one given privileged standing to vision? (The juxtaposition of Black and Harlan here brings to mind this remark from Sanford Levinson: ‘If Justice Black was the quintessential “protestant” in the sense of emphasizing the written text, then the great exemplar of “catholicism” was his colleague John Marshall Harlan.⁴⁷)

Justice Stewart, also dissenting, echoed Justice Black:

I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present cases. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to the personal and private choice, based upon each individual’s moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual’s choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the Constitution. And that I cannot do. . . .

⁴⁵ In *The Legal Imagination* 721.

⁴⁶ R R Garet, op cit, 109.

⁴⁷ S Levinson, “‘The Constitution’ in American Civil Religion’ (1979) *Supreme Court Review* 123, 135.

What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy ‘created by several fundamental constitutional guarantees.’ With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.⁴⁸

Stewart suggests that the Constitution is a container (with various ‘part[s]’), which he has entered in to and has been unable to ‘find’ a ‘general right of privacy’. The ‘right’ is simply not there. After having read Henk Botha’s *Metaphoric Reasoning and Transformative Constitutionalism*, we might be inclined to suggest that such an approach to the Constitution expresses a failure of the metaphorical imagination. I would say that in the world of flux that we live in there are more fitting metaphors to live by.

* * *

In our engagement with White’s work we might do well to draw from the language of the economist Arjo Klamer, who, whilst taking rhetoric seriously (*Rhetoric), has said much about the metaphor of ‘conversation’ over the last twenty-five years.⁴⁹ Klamer distinguishes metaphors ‘according to their functions’:

Pedagogical metaphors serve to enlighten and clarify an exposition and can be omitted without affecting the argumentation as such. Good teachers have many. To get the idea of a stable equilibrium they draw a picture of a bowl in which a rolling ball inevitably comes to rest on the bottom. I like the bathtub as a metaphor for an accounting system to illustrate how flows out (money down the drain) and flows in (but watch the faucet) relate to the level of the bathtub (the balance of stocks). . . .

Heuristic metaphors catalyze our thinking, stimulating researchers to approach a phenomenon in a novel way. (A heuristic is a guide for thinking) Benjamin Franklin coined the metaphor ‘time is money’ to admonish young Americans to use their time efficiently; Gary Becker used it as a guide to explore the economics of time . . .

Constitutive metaphors underlie all thinking to such an extent that thinking without them is inconceivable. They are those essential conceptual schemes through which we interpret a world that is either unknowable . . . or at least unknown. To say anything about the world

⁴⁸ 721-2.

we must characterize it. But because we cannot literally know the nature of the natural and social worlds, we resort to the figurative. The metaphors that constitute our thinking lie so deep that we are usually unaware of them. Only in confrontation with others who think in different (constitutive) metaphors might we become aware of them.⁵⁰

Klamer would celebrate not the pronouncement 'I think, therefore I am' but a tentative beginning along the lines of 'we talk, and we become . . .' A key question here is, What is to 'become' of us as we meta-phor?

For Klamer, 'constitutive metaphors . . . can explain much of the confusion and misunderstanding that characterizes discourse within economics and between economics and its lay audiences.'⁵¹ Toward such explanation, he says:

If your constitutive metaphor sees the world as a clockworks and suggests that people don't think but calculate, then thinking about thinking makes little sense. . . . [A] mechanistic constitutive metaphor . . . will determine how we actually see the world. Talk about metaphor and discursive practice will seem altogether misguided and perhaps subversive to an economist who operates under a mechanistic constitutive metaphor. If the world is a frictionless clockworks, then equilibrium prevails everywhere. The notion of disagreements (for economists are part of the world) or discord makes no sense, nor do attempts like this chapter to understand disagreements. To conceive of economics as a discursive practice based on a handful of metaphors would be subversive for such a world view because it threatens to emphasize rhetorical tools at the expense of fact and logic, a mechanistic world's means of inquiry.⁵²

If Klamer's claim that economics has grown from 'a handful of metaphors' is accepted, much economic discourse would significantly change, if only to debate claims about that which might be 'misguided and subversive'. During such debate, participants would do well to give due attention to the communities and to the ways of imagining the world constituted through acts of metaphor.

⁴⁹ His landmark work is A Klamer, *The New Classical Macroeconomics: Conversations with the New Classical Economists and their Opponents* (1984).

⁵⁰ A Klamer, *Speaking of Economics: How to get in the conversation* (2007) 113-15.

⁵¹ A Klamer and T C Leonard, 'So what's an economic metaphor?' in P Mirowski (ed), *Natural Images in Economic Thought: 'Markets read in tooth and claw'* (1994) 20, 21-22.

⁵² Ibid 39-43.

Biological metaphors pervade the language of several sub-tribes within economics. Central to the 'institutional' tradition is 'artificial selection' (borrowed from Charles Darwin). This tradition is unknown to many economists, especially those who call 'economics' that which is merely a selectively imagined 'neo-classical' economics. Other economists simply suggest or claim that the tradition (like other non-neo-classical traditions) has little or nothing of value to offer. To this we could respond:

According to the rhetorical perspective, however, disagreements among economists arise not so much because we are misguided or strategic in resistance, or even because we hold different 'preferences'. Rather, we are subject to clashing constitutive metaphors. Constitutive metaphors are not picked up and discarded like ... mere preferences; constitutive metaphors are us. A fundamentally changed perspective, say from positivist to rhetorical, requires changing oneself, which is painful and rare. Like Rome and Byzantium, conflicting constitutive metaphors lead not to disagreement, but to schism. ... We may discover that major disagreements and misapprehension are not the product of stupidity, ignorance, and avarice that we attribute to others, but can be accounted for by conflicting constitutive metaphors. ... Constitutive metaphors may account for ... the lack of communication between neoclassical economists and economists of other kinds, such as Marxists, Austrians, post-Keynesians, socio-economists, and institutionalists.⁵³

Unless we are like Augustine and can, aided with some faith in an invisible hand, readily create 'pleasure' in a 'painful' process of 'changing oneself', it seems obvious that there must be great resistance to Klammer's invitation to take 'constitutive metaphors' seriously and to take a 'rhetorical' turn.

Resembling White's work, Klammer's can be read as an invitation to his colleagues to think and speak differently, to become more fully conscious of what our languages (including the conventional economics language of rationality) leave out and to work out ways to echo that consciousness in our *talk*. He invites us to take note of 'the general frustration with the discourse of academic economists'⁵⁴ and to respond to the people who express it as people who we might have something to learn from. That would not only help check the imperialistic attitude that economists are now well known for but start some potentially fruitful conversations in and out of economics.

⁵³ Ibid 43-44.

⁵⁴ A Klammer, 'As if Economists and Their Subject Were Rational' 163.

* * *

Klamer and White, by my reading, write out of a similar constitutive metaphor. In *Justice as Translation* White presents his root metaphor with these words:

For me the fundamental image of life is not that of economic production and exchange, nor that of knowledge acquisition and transfer, but that of composition: people seeking to make texts that will establish meanings and relations with others. We should conceive of the relevant world as a world of people speaking to each other across their discourses, out of their languages, out of their communities of knowledge, and speaking as people seeking to be whole.⁵⁵

Like Klamer, White seeks to define and celebrate a certain kind of conversation, one that cannot be reduced to the 'economic', whatever might be meant by that metaphor.

What kind of conversation exactly? One in which the parties to it are actively exercising their metaphorical imaginations. Linguist George Lakoff and philosopher Mark Johnson, in *Metaphors We Live By* (1980), have provided some helpful imagery. This is what they say about 'the negotiation of meaning':

To negotiate meaning with someone, you have to become aware of and respect both differences in your backgrounds and when these differences are important. You need enough diversity of cultural and personal experience to be aware of divergent world views exist and what they might be like. You also need patience, a certain flexibility in world view, and a generous tolerance for mistakes, as well as a talent for finding the right metaphor to communicate the relevant parts of unshared experiences or to highlight the shared experiences while deemphasizing others. Metaphorical imagination is a crucial skill in creating rapport and in communicating the nature of unshared experience. This skill consists, in large measure, of the ability to bend your world view and adjust the way you categorize your experience. Problems of mutual understanding are not exotic; they arise in all extended conversations where understanding is important.⁵⁶

In such 'conversations', the 'understanding' you come to is not a simple addition to your stock of information about the world but a transformation in your sense of the

⁵⁵ *Justice as Translation* at 20.

world and your place in it. The common law method of making law may be imagined as a structured version of these 'conversations'. A new case is made sense of in terms of working out 'right' similarities with an analogous case, or 'metaphor'.⁵⁷

The negotiation of meaning concerns not only a self-other (or: 'I'-you) relations but a selves-within-self relation. (Which 'I' is speaking? Which 'you' is speaking? Which 'Posner' is speaking?⁵⁸) Lakoff and Johnson speak of this latter relation when talking about the activity of 'self-understanding':

Just as in mutual understanding we search out commonalities of experience when we speak with other people, so in self-understanding we are always searching for what unifies our own diverse experiences in order to give coherence to our lives. Just as we seek out metaphors to highlight and make coherent what we have in common with someone else, so we seek out *personal* metaphors to highlight and make coherent our own pasts, our present activities, and our dreams, hopes, and goals as well. A large part of self-understanding is the search for appropriate personal metaphors that make sense of our lives. Self-understanding requires unending negotiation and renegotiation of the meaning of your experiences to yourself. In therapy, for example, much of self-understanding involves consciously recognizing previously unconscious metaphors and how we live by them. It involves the constant construction of new coherences that give meaning to old experiences. The process of self-understanding is the continual development of new life stories for yourself.⁵⁹

The life of a 'self', we might say, is storytelling, a process of imagining its future possibilities whilst reconstituting its past. To understand yourself is to know that you cannot fully 'understand' yourself, for in the act of understanding you are only just coming to be, in an unending process of negotiation and renegotiation of meaning.

⁵⁶ G Lakoff and M Johnson, *Metaphors We Live By* (1980) 231.

⁵⁷ Metaphor 'can be sensed as a type of analogical process in which we project structures from an experiential domain of one kind (the source-domain) onto a domain of another kind (the target domain).' M Johnson, 'Some Constraints on Embodied Analogical Understanding', in D H Helman (ed) *Analogical Reasoning: Perspectives of Artificial Intelligence, Cognitive Science, and Philosophy* (1988) 25, 25.

⁵⁸ Wayne Booth has offered the beginning of a helpful language here: 'Posner 1' and 'Posner 2'. W C Booth, 'Why Banning Ethical Criticism Is a Serious Mistake' (1998) 22 *Philosophy and Literature* 366.

⁵⁹ Lakoff and Johnson, *op cit*, 232-3.

Questioning

Each one of White's principal works contains a vast number of extraordinary questions, many of which concern our ordinary experience of life. What sense are to we make of these questions? A helpful place to begin might be this opening statement of indebtedness in *The Legal Imagination*:

[A]nyone who knows Theodore Baird of Amherst College will instantly see that this book is the direct result of his teaching, full of his ideas and imitative of his style; and to such a one, nothing here that may please or instruct will be new or unfamiliar. If I were asked to be particular, I would say that he taught me what writing is and how to ask a question, but that is just another way of saying that to him everything is owed.¹

How did Baird, White's composition teacher, teach him to ask a question? Let us first turn our attention to Baird, to whom *The Legal Imagination* is dedicated.

* * *

In the late 1950s, soon after White took Baird's course, an 'interested outsider', described 'Amherst's famous and radical composition course' as 'the unique product of various twentieth-century American trends in science, philosophy, and literary criticism.'² Baird was not one to respect conventional disciplinary boundaries. The direction of course overlapped with Baird's *The First Years* (1931), an anthology of selections from Henry Adams, John Stuart Mill, Marcel Proust, and others concerning the experience of youth. The introduction to the book suggests much about his approach to the teaching of composition. Here are some fragments from it:

¹ *The Legal Imagination* xxvi. In the 1985 abridged edition White writes: 'in the intervening years my recognition of the influence that Theodore Baird has had on my work has only grown and that I mean the dedication to him more fully than ever' (xvii).

² J H Broderick, 'A Study of the Freshman Composition Course at Amherst: Action, Order, and Language' (1958) 28 *Harvard Educational Review* 44, 44 and 47.

This book is an attempt to provide material for a course in the writing of English by directing the student's attention to his own resources of experience. It contains selections from autobiographies which deal in various ways with experience of childhood and youth, common to human beings. It is intended to help the student to remember his own past experience and to convey that experience in writing.³

[The student] is likely to become conscious of words for their own sakes and of their importance. He can understand the objection to clichés, which grow thick about experiences of childhood, by perceiving that they do not accurately convey his experience.⁴

In the process of writing autobiographically the student ought to make some interesting discoveries about himself. . . . This self-discovery, intimately connected with the process of writing, furnishes the student with present proof that the art of writing is more closely connected with straight thinking than it is with rules . . . , and that it may have importance for its own sake.⁵

For Baird, rigid 'rules' may impair rather than enhance the composing process, in which there is a fragile relation between 'words' and 'experience'. He considered that a student would do well to attend to this fragile relation and that there was no better place to start than by attending to one's own experience. In the process, a student may get a sense that 'the art of writing' is a practice whose purpose is not to 'convey' some abstract 'content' in language but to transform lived experience.

A central question Baird invited students to ask themselves is this: 'Who am I?' In a passage from a memorandum Baird circulated to his staff, he wrote:

[A] writer who wants to write may be better off if he knows who he is. . . . We understand my simple remark, though it is not always illuminating for the freshman, since for him the question 'Who am I?' can be answered simply by his name, as if that settled the matter. We ask him to be introspective, to look within for just a moment, and generally speaking he complies with reluctance. After all, who is this freshman? We do pay him the highest

³ T Baird, *The First Years: Selections from Autobiography* (1931) 1.

⁴ Ibid 9.

⁵ Ibid 22-3.

compliment, if only he knew it, by insisting over and over again that he is an Individual. Who are you? Why can't you talk in your own voice?⁶

That last question is an invitation to imagine the self not as a unit but as a collection of voices, out of which a person can begin to forge their 'own voice'.

Baird resisted conventional pedagogy, which largely imagined teachers as being responsible for transporting factual information. Baird believed that education worthy of the name begins in 'conversation', the nature of which is suggested in these fragments from a late 1950s (when White was a freshman) course description:

[W]riting remains an art, and about art no one knows how to teach another how to succeed, no one knows enough to pronounce finally that this or that example is a success. A teacher may praise something that a student has written. Another teacher, conceivably, might make a different judgment. This may not seem fair, but such is the world once you leave childhood behind. Lawyers, no matter how clearly they present their cases, do not always win. Medical doctors sometimes make wrong diagnoses. As for literary judgments, there . . . is a wide difference of opinion about Henry Miller, Samuel Beckett, and so on. These are the facts of your situation – of your teacher's situation – in English 1-2. . . . The best we can do is treat writing – and the writer – with respect and imagination, and in our conversations about writing and the writer hope to say something.⁷

At Amherst you will find that the burden of knowledge usually falls on the student. Thus in English 1-2 you supply for your writing your own information, material, whatever you want to call it. After all, you have received an expensive education, you have probably been taught well, you have held various jobs and have played games, and you have had your own thoughts and feelings for eighteen years. This is your 'experience,' and from this seemingly shapeless, yet entirely individual source, you will derive whatever it is you have to say.⁸

In the actual day by day conduct of the course, English 1-2 can become, at its best, a dramatic dialogue, where you and your teacher exchange remarks, you and your fellow students converse, with a certain amount of common understanding. There will be no verbal formula to memorize, and although there is, as in all courses, a vocabulary to pick up and repeat, you will within a relatively short time, a few months, a year or two, be able to say only what you

⁶ Quoted in R Varnum, *Fencing with Words: A History of Writing Instruction at Amherst College during the Era of Theodore Baird* (1996), 4.

⁷ 'A Description of English 1-2', reproduced in R Varnum, *ibid*, 249-50.

can say for yourself. Whatever you learn, you learn. This goes for all formal education, when looked at from a distance.⁹

As for your teacher, he does not exist to give you the answers. His function is to ask questions, and if by inadvertence he should ever chance to tell you something, you should immediately turn the questioning on him.¹⁰

Baird apparently lived by the Socratic midwife metaphor, with the teacher serving as a midwife to their student's learning.¹¹ This metaphor, unlike the influential transmission metaphor, suggests the sense that the learning process is a collaborative enterprise (between fellow 'writers' who share the same 'situation'), the core of which is 'questioning' in 'conversation'. Baird's ideal with regard to the course, namely 'a dramatic dialogue', could serve as a model for what other professions 'can become at [their] best'. What could the people involved want from each other above that of to 'treat ... with respect and imagination, and in ... conversations ... hope to say something'? We can be sure that 'dramatic dialogue' is not a babble in which everything goes but an authentic interchange, in which people listen to each other deeply enough to be transformed by what they hear, even if there is disagreement.

For Baird, 'the heart' of the course was in 'the assignments'.¹² He developed a custom of preparing (or directing preparation of) a set of new assignments each semester. The questions were not of the kind asked by a teacher who has the right answers in mind from the outset; they are beginnings for an open-ended exploration. In an article addressed to alumni, he said this about the function of the assignments:

We begin our thinking by saying that writing is an action, it is something the student does, and the teacher aims at putting the student in a position where he can do it. The assignments are our means of locating that situation in which the student knows what he is talking about, in which he feels the desire to express what he knows. When we make an assignment we do not say 'Discuss —' or 'Write a paper about —,' but give explicit directions that once they are

⁸ Ibid 250.

⁹ Ibid 251.

¹⁰ Ibid.

¹¹ For a discussion of this metaphor in the context of law teaching, see B B Woodhouse, 'Mad Midwifery: Bringing Theory, Doctrine, and Practice to Life' (1993) 91 *Michigan Law Review* 1977. The 'Socratic' approach is sometimes associated with bullying and intimidation, an association which raises a vast set of questions, including the meaning of 'bullying' and 'intimidation'. I would follow Anthony Kronman disconnecting the association – see his *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993) 110.

followed the student will find himself saying something he did not know he could say. . . . For the teacher the assignments are his means of controlling conversation, of saying over and over again and always more particularly, tell me what you know. They are stimuli spring boards, invitations to stand on the edge of an abyss, . . . and often they do work.¹³

Etymologically, to express is a squeezing out, a pressing forth.¹⁴ What comes forth may be more than imagined at first: 'the student will find himself saying something he did not know he could say'. With 'the student in a position where he can do' the activity of 'writing', he is also in the position to engage in 'conversation', a risky activity 'on the edge of an abyss'. Here at 'the edge', we may take it, is a place near to that where we can begin to compose.

After offering those general remarks about the assignments, Baird goes on to offer 'an apparently simple example':

A student who is a good tennis player sets out to write a paper on what he does when he serves a tennis ball. He knows he knows what he is writing about, yet as he begins to address himself to his subject he immediately encounters the inescapable fact that his consciousness of his own action contains a large area of experience quite beyond his powers of expression. The muscular tensions, the rhythm of his body as he shifts his weight, above all the feel of the action by which he knows a stroke is good or bad almost before the ball leaves the racket, all this and much more lies beyond his command of language, and rendered almost speechless he produces a mess. He knows in the sense that he can perform the action, but he does not know in the sense that he can communicate this action to a reader. At this point the teacher tries to get him to distinguish between these two levels of experience, to become aware of them, to generalize about them. The next step is for the student to take for himself by recognizing that a part or an element of his experience can be communicated to another person when he isolates the order in which he throws the ball into the air, raises his racket, and so on, and that the order of his action as distinguished from the action itself is the subject of his writing. The student may even perceive that between the order of movements as he sees them and the order of words in a sentence some relation can be made, and that when he has made this relation he knows what he is talking about.¹⁵

¹² Quoted in Varnum, op cit, 117.

¹³ T Baird, 'The Freshman English Course' (1952) *Amherst Alumni News*; reprinted in T Baird, *The Most of It* (1999) 199, 201.

¹⁴ J Dewey, *Art as Experience* (1934) 64.

¹⁵ Baird, 'The Freshman English Course', op cit, 202-3.

For Baird, the place to begin the activity of composition is the familiar and the ordinary. The destination is the unfamiliar and the extraordinary (*Alienation). The initial effect of the tennis assignment for the tennis player is to disturb the student's relationship with language. One aim, it would seem, is to reduce the 'area of experience . . . beyond his powers of expression'.

The writing process itself, we can be sure, provides the student with a new 'experience', which offers new material for trying to make sense of:

As we go along we try to define necessary words so that the student makes for himself a rhetorical vocabulary by which he is able to talk about the act of writing. We try to arouse in the writer an awareness of his relation to his subject and his audience, asking the devastating question, who – besides his English teacher – could possibly be interested in what he writes? . . . I see myself not as an instructor issuing instructions about how to write but as someone who picks up the pieces wherever they may be found and tries to see how they can be put together into some kind of shape, any kind of shape. It is this act of going together which is my concern and I am a teacher of Composition. . . . The student may come to respect good writing, however plain. He may even recognize as the marvel it is the human being's power of making order out of chaos.¹⁶

The student has to jointly 'put together' self and language, a compositional process of finding and making an authentic voice, a process in which she (though only 'he' at Amherst until 1976, when women were first admitted as students) becomes what might be called a literary critic. In the process, the student may recognize as the marvel it is Baird's power of turning an apparent order into chaos for the purpose of putting her in a position to compose 'order out of chaos'.

Imagine showing up to class and being asked as your first assignment to write a paper, due next class, in response to questions like these:

During the last few days you have been asked a great many questions by a lot of people. Try to recall exactly what some of these questions were by making a list of those you can remember. Look the questions over and ask yourself what all this questioning has been about.

¹⁶ Ibid 204-5.

1. Select 5 questions from your list, ranging from foolish to interesting, marking the most foolish with a # and the most interesting with a *.
2. Why do you apply the adjectives 'foolish' and 'interesting' to these particular questions?
3. What has all this questioning been about? How do you explain this social manifestation? After all you can go to lots of places, to a hotel, to a country club, and not be subjected to such persistent questioning. What is going on here?

What are we to make of these questions about the activity of questioning and 'places'? What is going on here? What kind of game is Baird playing? Do we want to play?

Baird's questions came before the freshman White; they 'astounded' him, offering him not only a new experience but also a request to seriously attend to it:

These questions . . . were unlike anything I had ever seen. To begin with, they asked me to speak out of my own experience – as if I had any! – which I don't think anyone else had ever done; and they assumed that this experience included making judgments of my own, and judgments about such things as 'foolish' and 'interesting.' I was thought to have my own scale of values; to be able to set my own speech and conduct, and that of others, on that scale; and to have something to say about how I did this – about what my scale was, where it came from, and how and why I applied such labels as 'foolish' and 'interesting' to my experience, and so on.

Yet more: notice the opposition to 'foolish': it is not 'wise' – you can imagine what my eighteen-year-old self would have to say about wisdom – but 'interesting.' (This was in fact a way of defining 'wisdom' for me, and for the others in the class, in terms of our experience of finding things interesting.) This in turn assumed that we did find things interesting and that we were motivated by our interests, rather than, say, by the demands or expectations of others or by our own careerism or ambition. Such a person as the one we were assumed to be would naturally be interested in his own interests, interested in saying something about them, interested in speaking in his own voice about his experience of life and language and himself. The questions thus assumed, and in making this assumption created a demand, that each of us had a self, had experience, has something to say of his own – that each of us was a center of meaning and value and language. They created a vacuum each one of us had to fill. All this was expected of us.

More still: This course invited us to see our world as made up of languages, of different ways of talking; to see our college, for example, not as a thing or a structure, but as a more or

less shared expectations as to how to talk and live, and much the same could be said of other institutions, from country clubs to the law. Each of these languages consisted of patterns of response and action, which could be learned, and learned well or badly. If one learned them by rote, unreflectively, one might become too much shaped by these patterns, by social and moral clichés, and perhaps never be capable of independent thought and action. (Think of what it means to be raised in a culture in which ‘race’ is assumed to be a feature of all human beings.) The task of life was therefore a writing task, to learn to use our various languages reflectively, in such a way that we controlled them rather than they us; to use them to express our own experience, or to attain our ends; and this meant learning to have both experience and ends worthy of the name in the first place. This, too, perhaps the primary process of living, required a reflective and constant negotiation with the languages that had authority in our world, the languages that sought to tell us what our experience was and what our ends should be.¹⁷

Baird’s questions are certainly unlike those we can expect from those who worship ‘the economics of . . .’, from those, that is, who do not take ‘experience’ (and thus ‘a self’) seriously. Baird empowered students by enabling them to imagine how languages control them – *are* them to a significant extent – and that they have choices concerning how to respond to this control. In being ‘asked . . . to speak out of my experience’, White was invited to imagine himself not as Anystudent conveying memorized information to Anyteacher but as a composer of language speaking in an authentic ‘voice’ with another composer. With the invitation comes a prod to make author-ity a subject of conscious thought. The kind of authority that interested Baird was not so much official capacities and roles but a certain form of talk, a form that is living and authentic, which makes it worthy of attention and respect.

From this brief tuning in to Baird’s teaching, it can be confidently said that he imagined teaching to be a transformational profession, which is devoted to enabling students to become builders of their own knowledge. He invited students to take control of their own learning, not the least by attending to the activity of asking questions. Baird is one who hoped to teach students the art of questioning. His central hope, we may imagine, is that students will ‘turn the questioning on him’. At

¹⁷ J B White, ‘Why I Write’ (1996) 53 *Washington and Lee Law Review* 1021, 1029-30. A slightly modified version of this passage resides in *The Edge of Meaning* at 130-31.

this point, students are no longer 'students' but partners in an explorative 'dramatic dialogue'.

* * *

White started his academic career in 1967 at the University of Colorado. Here he had no pressure to 'publish or perish', for the 'student [came] first'.¹⁸ At Colorado, White put together materials for a course titled 'The Nature of Legal Expression', a course that he set out 'to give law students something like the experience I had at college'.¹⁹ Out of the materials came *The Legal Imagination*.

'What does it mean to learn to think and speak like a lawyer?'²⁰ That is the fundamental question with which *The Legal Imagination* opens. 'The readings and the writing assignments', White says, 'can be said to elaborate and complicate that question.'²¹ Thousands of questions echoing the 'style' of Baird's composition course follow it. Time and time again his reader is offered the experience of living at the edge of composition, where she can self-consciously transform her languages, selves, and communities, in the quest for a plausible harmony.

* * *

Baird, as mentioned above, apparently lived by the Socratic midwife metaphor. White's reading, in *When Words Lose Their Meaning*, of Plato's *Gorgias* has much to suggest about this metaphor. By way of an introduction to the *Gorgias*, White says:

Plato's *Gorgias* is a dialogue, not a treatise . . . [T]he dialogue itself is meant to exemplify the kind of life that Socrates calls 'dialectic'. The form of the dialogue is not a primitive or bizarre method for setting forth a doctrine that Plato is too perverse or incompetent to say straight out; what it offers is an engagement in an activity, and this activity is its true subject. As we shall see, Socrates does occasionally say something to describe dialectic, but its clearest and truest definition is to be found not in what he says but in what he does. . . . It is worth observing that certain aspects of the process exemplified here are very close to what is usual in Plato's other Socratic dialogues and to Socrates' description of his mode of life in the

¹⁸ 'Why I Write' 1021.

¹⁹ Ibid.

²⁰ *The Legal Imagination* xix.

²¹ Ibid.

Apology. There we are told that Socrates would typically seek out a person who claimed to know how to do something—here the teaching of rhetoric, elsewhere generalship or mathematics or teaching virtue—and ask his interlocutor his central questions: Who are you? What do you do? and what do you know? Since we all know how to do things that we cannot explain, things we have never thought about beyond saying ‘I am a banker’ or ‘I am a surgeon,’ this line of questioning has the result of making conscious what before was not, the relation between the self and culture. I am a football coach or a law professor, I say, and only then begin to realize, when for Socrates that is not a sufficient answer, that this identity is a cultural one, not necessary but chosen, and chosen by me without my wholly knowing or understanding it.²²

Here we have an echo of Baird’s composition assignments. ‘I am a tennis player, and I’ll happily write an assignment on how to serve a tennis ball.’ With that confident and enthusiastic disposition some conditions are in place for a risky conversation.

White introduces the discussion form of questioning for purposes of ‘refutation’, which ‘results in mortification’ relating to one’s selves: ‘One part of the self is appealed to against another part, and in the process a previously unknown self-contradiction is revealed.’²³ This refutation is part of ‘dialectic’. Of particular significance, the reader is not a detached observer. Concerning the textual community, White writes:

What the text really seeks to teach its reader is not how to speak this language but how to remake a language of his own. It does not teach a particular set of questions and dialectical responses, to be repeated on other occasions, but . . . how to ask questions of one’s own. To do this, the reader must be a center of independent intellectual energy, a remaker of language and a composer of texts, and it is with helping him to become these things that this text is ultimately concerned.

How does the text seek to do this? It treats the reader rather as Socrates treats his interlocutors. It works on him in large part by isolating and disorientating him, by creating a conscious gap between self and language that makes the nature of both problematic in new ways. Like the interlocutor, the reader is broken out of his culture, out of the language and activities that define him; he is thus prevented from defining himself by simply repeating established forms of speech or conduct. He is forced to function on his own: to take and

²² *When Words Lose Their Meaning* 94-5.

²³ *Ibid* 95.

define positions of his own creation and to respond to those, valid and invalid, asserted by Socrates. . . .

Dialectic . . . proceeds not by making lengthy statements or exhibitions but by questioning and answering, one to one. Its object is to engage each person at the deepest level, and for this it requires utter frankness of speech on each side, a kind of shamelessness in saying what one really thinks. One's concern is not with what people generally think, or anything of the kind, but only with what one thinks oneself and what the other thinks. This is not a competition to see who can reduce the other to his will; it is a process of mutual discovery and mutual refutation. One accepts refutation gladly, for it reduces the divisions and disharmonies within the self, which Socrates tells Callicles are so much worse than those in an orchestra or those between oneself and others. The object of it all is truth, and its method is friendship, the full recognition of the value of self and other in a universe of two.²⁴

That passage can serve as a resource for talking about Baird's questioning. It certainly seems to me to be fitting to say that Baird sought to teach his students 'how to ask questions of one's own' and that the structure of his assignments 'work on' his students 'in large part by isolating and disorientating' them. Also, their aim is 'to engage each person at the deepest level'. This arguably is the material of 'friendship' worthy of the name. (We can be sure that it is out of this kind of relationship that White uses the word 'friend' in his dedication, in *The Legal Imagination*, to Baird.) It cannot be emphasized enough that one's experience of the interchange will be influenced by one's sense of its purpose. If one adopts the mindset that there is a 'competition' in which the object is to defeat one's opponent, then 'refutation' is not a movement that '[o]ne accepts . . . gladly'. Refutation can, however, be embraced when the object is deeper self- and mutual understanding.

* * *

White has more to say about Plato's Socrates in *Acts of Hope*. Here White offers a reading of the *Crito*, which is one of a collection of Plato's dialogues about the last days of Socrates. (The *Crito* follows the *Apology*, in which Socrates is sentenced to death by his fellow citizens for corrupting the youth of Athens and for not believing in his city's gods. Socrates, however, considers himself innocent.) The structure of the *Crito* is as

²⁴ Ibid 109-10.

follows. There is (i) an opening scene in which a disturbed Crito visits Socrates in prison to arrange his escape; (ii) a speech by Crito in which he pleads with Socrates to escape now; and (iii) a reply by Socrates in which he goes over arguments for putting justice first and, after imagining the arguments that the Laws of Athens (the *Nomoi*) would make against him escaping, considers it unjust to break the law.

The common approach to the *Crito* 'is characterized by a preoccupation with the speeches of the Laws, and it attempts to elevate the apparent shallowness of these speeches into a philosophical position worthy of a great philosopher's decision to die.'²⁵ The speeches are thus treated as 'a mini-treatise on legal obligation'.²⁶ This approach 'presupposes that the speeches can be understood in isolation from the work of which they form a part.'²⁷ White considers such an approach to be a 'mistake'.²⁸ Speaking at a 'general level':

[T]he mistake is to assume that the meaning of the text as a whole is propositional in kind, that is, that it can be reduced to a set of claims each of which can be independently tested for its truth or adequacy. May it not be that at least the *Crito*, and perhaps other Platonic dialogues, and indeed perhaps other texts we think of as philosophic as well, have a meaning of a richer and more problematic kind, one that cannot be reduced to the propositional? May it even be that our modern aspiration to produce philosophic texts that can be reduced to such forms is itself misguided, likely to fail, and perhaps an evasion of philosophic responsibility?²⁹

White, we can take it, is troubled by conventional 'modern' questions about 'meaning' that are separated from what we call 'experience'. Readers familiar with *The Legal Imagination* might well be tempted to ask: What does it mean to learn to think and speak like a philosopher? Also: Could thinking and speaking like a lawyer strongly resemble thinking and speaking like a philosopher?

White goes on to take seriously the dialogue as a whole and to 'read the *Crito* . . . as a composition of which we assume all the parts have a place and meaning, no one of which can be elevated above the others except in the terms, and on the grounds, that

²⁵ E J Weinrib, 'Obedience to the Law in Plato's *Crito*' (1982) 27 *American Journal of Jurisprudence* 85, 86-87.

²⁶ Ibid 87.

²⁷ Ibid.

²⁸ *Acts of Hope* 6.

²⁹ Ibid (footnote omitted).

the text itself affords'.³⁰ White's approach is an act of hope: 'The hope is that we may find a way to respect the texts as it is composed, attending to its form, its methods, its various parts and their relations, and to discover the kind of coherence and meaning it then proves to have.'³¹ This approach is a challenge to certain patterns of expectations:

We could put it, perhaps, that my object is to read this 'philosophic' text not as a string of propositions but as 'literature,' that is, with an eye to possibilities of meaning richer and more complex than the propositional; but we would do this in part in the hope of being instructed in the falseness of the way we habitually distinguish between these two forms of thought and expression. It may be that great philosophy is literary in many of its deepest commitments, great literature philosophic, and that what is called for is a way of reading both that attempts to recognize their full dimensions of meaning.³²

What White has to say may be extremely simple, the difficulty may lie in escaping from habitual modes of thought and expression.

White suggests that we carefully attend to, for example: Socrates' question 'Why have you come?'³³; that 'Crito is shown to be a friend of Socrates'³⁴; Socrates' prophetic dream about his death³⁵; that 'Crito has forgotten all that he has presumably learned from Socrates about . . . the character of justice, and . . . what is proper to a serious discussion between those who seek the truth, that is, to philosophic conversation'³⁶; and that Crito is 'unable to maintain a philosophic position with clarity and firmness.'³⁷ Against that background we will better appreciate that when we hear 'the speech of the Nomoi' we are also hearing 'Socrates . . . speaking not to the world at large but to Crito, and not about the general issue of the obligation to obey the law, in any political state whatever, but about the propriety of his own contemplated escape.'³⁸ A critical attunement issue, for White, is the set of questions that we ask ourselves as we read. After 'the third break in the conversation' between Socrates and Crito, White says:

³⁰ Ibid.

³¹ Ibid 7.

³² Ibid (footnote omitted).

³³ Ibid 8.

³⁴ Ibid 9.

³⁵ Ibid 9.

³⁶ Ibid 11.

³⁷ Ibid 19.

When one reads this text . . . with an eye to all of its parts and not merely to what seem to be its central speeches, it is full of difficulty and uncertainty, arising not the least from the unsuccessful efforts of the two friends to engage on a common question in a common way. 'How will Socrates respond to this man?' is the question we are invited to ask, and to which the rest of the text, including the speech of the Nomoi, is a response.³⁹

To the extent that the questions we ask shape what we can come to know, we will do well to ask ourselves whether we are asking the right questions. How, we might ask, are we to know for certain whether or not our questions are 'right'?

In reading the *Crito* with attention to the character of Socrates' response to Crito, we may take it that White seeks to do justice to a work about acting justly. After discussing the speeches of the Nomoi and the decision by Socrates to obey (and thus to decline the opportunity to escape), White writes:

Why is this a fitting end? Not because it is of itself a good thing to suffer unjustly at the hands of Athens; but because this end, unlike escape, does not require Socrates to give up the major purposes of his life. Indeed, it is a way of fulfilling a major part of that purpose, which is to establish the value of thinking and talking about what we ought to be and do collectively, as a polity, and not merely as individuals: to establish, that is, the legitimacy of discourse about the nature of the just community. His success in doing this is in fact the foundation of our own political thinking ever since, which depends upon our being able to imagine ourselves not merely as individuals who happen to be found together, our interests in contemporary conflict or harmony, like rats in the maze of life, but as a larger polity, as a city or nation or society that has a moral life and career of its own of which we can ask the question, Is it just?

There are now, as there have always been, currents of opinion that wish to deny the value and coherence of that question, and the legitimacy of the discourse based upon it. Yet this question is what has enabled us to think about ourselves as we have in the West, from Plato through Cicero and Aquinas and Machiavelli to the present time. If all were reducible to the individual (or to the family), to a calculation of individual costs and benefits, it would be impossible to talk, as Socrates did and as we have ever since, of a city or nation as having a character and moral life, which could be analyzed and judged by comparison to an ideal.

³⁸ Ibid.

³⁹ Ibid 13.

Socrates' death expresses his commitment to that possibility; to turn away would be to deny it. If he escaped to Megara or Thessaly, he could pursue questions of justice, if at all, merely as a theoretical matter, without the engagement with the actual that can make the pursuit real. For in his life Socrates has constituted Athens as an idealized dialogic partner, a moral actor for whom justice can be as central a concern as it is for an individual. It is this fictive creation partly of his own making that he would rather die than deny; especially when the death, like this one, would do so much to make this fiction real.

Athens is his city: both the actual polis and, equally important, the vision of what it could become if it were to define itself by a concern for justice, if it were to ask the question Socrates taught individuals to ask—How are we to lead our lives in a just way?—and mean it. This is what he cannot leave without abandoning himself. To walk away would not be to break an agreement to which he is held against his will but a commitment to a sense of himself and the possibilities of human life to which he has devoted his existence; it would indeed 'injure those whom he ought least to injure,' as the *Nomoi* claimed, but in a very different sense from theirs. To abandon his commitment to this conversation with this partner would be to destroy the meaning of his life.

Socrates thus dies in order to establish the value and coherence and meaning of a certain sort of conversation, in which we still participate and from which we still benefit. This is what he wants *Crito* to see. . . . It would be a great mistake . . . to think of Socrates as operating out of a comfortable view of his city and its people. He is their most severe and troubling critic. Yet it has been a central part of his lifework to turn them in a certain direction, towards thinking of justice as their ultimate collective concern, and, though he is never optimistic about the prospect, it is the imagined possibility that he might succeed upon which he will not turn his back. He starts a certain kind of conversation with his city and will not give it up.⁴⁰

White here directs attention to a vice of a preoccupation with 'theoretical' talk, a kind of talk that eliminates a concern with 'character' and with the topic of justice to the extent that it connects with relations between characters. This attention is part of White's attention to virtue. Justice is a virtue. Is White's reading just? It seems to me that White's identification of a 'fitting' end is, well, fitting. The metaphor of 'fitting' here strikes me as highly apt for a contribution to a talk about justice that centered on part-whole relations. White's conversational, as opposed to 'theoretical', engagement with the *Crito* sounded to me to be in tune with Plato's work.

With that musical metaphor, let us hear Socrates' last words in the dialogue:

That, my dear friend Crito, I do assure you, is what I seem to hear [the laws] saying, just as a mystic seems to hear the strains of pipes, and the sound of their arguments rings so loudly in my head that I cannot hear the other side. I warn you that, as my opinion stands at present, it will be useless to urge a different view. However, if you think that you will do any good by it, speak up.⁴¹

I should acknowledge that I had not read the *Crito*, nor other readings of it, before reading White's reading, so I may be ill-equipped to 'hear the other side' about what is and is not fitting in the *Crito*. The sound of his arguments may ring too loudly in my ears to do justice to other arguments.

Peter Teachout is better placed than me to judge White's reading, for he read and reread the dialogue before hearing, in 1990, a presentation of White's 'work in progress' on the *Crito*.⁴² Here is a fragment of his response:

White's presentation transformed my understanding of the *Crito*. I had always thought that Plato's dialogue was about the philosophical question debated in the main body of the work, the question of whether it is right to escape the imposition of an unjust punishment. And I had always come away frustrated because it seemed to me that Plato's treatment of the question was superficial and disappointing. Throughout his appearance in the dialogue, Socrates was properly 'irritating,' as a gadfly is supposed to be. But he was irritating, I thought, in a clever and morally self-congratulatory way rather than by virtue of posing difficult questions. And his friend and dialectical sparring partner in the dialogue, Crito, struck me as something of a strawman. He was not of the same caliber as the opponents that Socrates takes on in the other dialogues—Callicles in the *Gorgias*, for example. The problem with Crito was that he let himself be controlled and directed by Socrates at every point along the way. He never put up any real resistance. He was, as Callicles would say, a piece of cake.

Then there was the famous speech of the Nomoi, the part toward the end of the dialogue where Socrates conjures up the *Nomoi*—the laws of the city of Athens—and imagines the

⁴⁰ Ibid 33-36 (footnote omitted).

⁴¹ Plato, 'Crito', in *The Last Days of Socrates* (trans H Tredennick and H Tarrant) (1993) 91-2.

arguments that they would make against his running away. I knew from the way Socrates treated these arguments that I was supposed to find them compelling, but they did not impress me that way. If anything, they left me more confused than ever. The *Nomoi* seemed to place obedience to civil authority above all else. But that directly contradicted the position that Socrates adopts elsewhere in the dialogues, particularly in the *Apology*, where he argues that one ought to place duty to God or to one's conscience above obligation to the laws of the civil authority. The whole performance left me deeply puzzled and frustrated.

White fundamentally changed all that with his presentation Working closely with the text of the dialogue, he showed that in fact the *Crito* is not about what I had always thought it was about. It is not about the philosopher's question of whether it is right to escape the imposition of an unjust punishment. That question is not irrelevant, but it is subsidiary to the central concern of the dialogue. The central concern, White showed, is reflected in the contrast established in the opening scene between Crito and Socrates: between a life characterized by anxiety and internal discord, on the one hand, and one characterized by internal harmony and self composure, on the other. The whole movement of the dialogue, he went on to demonstrate, is from the internal discord of Crito's world to the internal harmony and integrity of Socrates'. That is what the *Crito* is ultimately about: the requirements of a life of integrity. And that explains why, for Socrates, escape is out of the question. . . .

There was more to it than this perceptive substantive insight into the meaning of the *Crito*, however. The thing that had the greatest impact on me that evening was White's own critical performance. As I sat there listening to his presentation, I became aware that White was reading the *Crito* in a way it had never been read before. This became evident early on, with his treatment of the opening scene, regarding it simply as Plato's attempt to provide a little humanizing context for the philosophical discussion that follows. But White was taking the opening scene seriously. He was reading it as a literary scholar would read the opening paragraphs of a novel or the opening lines of a poem. It was that same kind of 'slow reading,' that same kind of active engagement with the text, that same kind of intelligent speculation about how the literary techniques employed by the author shaped the meaning of the work. The more White went on in this critical vein, probing and unfolding, the more convinced I became that he was right. This was how the *Crito* had to be read. This was what it was really about.

The shift in approach that White was proposing was not a radical one; indeed, in retrospect, it seemed natural and obvious, but it utterly transformed my understanding of

⁴² P R Teachout, 'Strains of Music: Understanding the Speech of the *Nomoi* in Plato's *Crito*' (1994)

the *Crito*. Suddenly it all fell into place: Plato was not just a philosopher, he was also a writer. He was a writer, moreover, of great talent and sophistication. The *Crito*, similarly, was not just an exposition of philosophical ideas, it was a conscious literary composition. And in order to understand it, to understand at least ‘the full dimensions’ of its meaning, one had to read it that way. White’s own critical performance exemplified the kind of reading – the kind of slow, speculative, intelligent reading – that was necessary to discover and to extract that meaning. The implications of what White was doing, moreover, went beyond his particular reading of the *Crito*. In order to understand Plato’s dialogues generally, he was suggesting, it was no longer enough to be merely a philosopher, one had to be a literary scholar as well. To me this was a great liberating discovery, made all the more exciting by the skill and beauty of White’s own performance.

Very rarely in my life has my view of a classic work and its author been completely transformed in a single academic paper, but this was one of those times. . . . White opened up for me that night a whole new understanding and appreciation of the *Crito* – and, more importantly, of Plato as a writer – and, for that, I will be forever in his debt.⁴³

It is suggestive of the power of a culture that separates ‘literature’ and ‘philosophy’ that Teachout ‘had always thought that Plato’s dialogue was about . . . the question of whether it is right to escape the imposition of the unjust punishment’. This separation, we might do well to remind ourselves (not the least to get in tune with what the *Crito* might have meant to Plato and his audience), is cultural, not in any sense ‘natural’. Teachout’s initial sense of Socrates as ‘irritating . . . in a clever and morally self-congratulatory way’ is suggestive of the power of the question or questions that influence one’s reading. A different question can change our experience of an event, including a text.

Teachout’s remark about his own ‘listening’ to White’s presentation is suggestive about the activity of reading (*Activity). This activity is not simply a mechanical act of passively taking in a ‘plain’ meaning but an active and purposive process, involving much more than moving the eyes. (We may wonder why listening has been neglected by philosophers.⁴⁴) During his ‘listening’, Teachout was ‘reading’ not only the *Crito* but the *Gorgias* and the *Apology* and . . . , and himself, and so on (where does one stop?). When one is ‘reading’ some sort of echoing between texts is pervasive

University of Cincinnati Law Review 51.

⁴³ Ibid 52-55.

(*Attunement). Writing conventions that pressure a writer to eliminate autobiographical elements in the name of Objectivity will pressure her to ignore this echoing. What might become of her if she does not resist these conventions? What would we have lost if Teachout had not told his autobiographical story? For me, Teachout's story offers helpful material with which to think about how to talk about our experience of reading. His story directs our attention to the fundamental questions we should ask ourselves when reading a text. A key question is not so much what the text means in terms of a set of propositions but what it means as an experience of imagination. Teachout speaks of White's reading as having 'transformed my understanding . . .' Might we do well to hope for such a movement when we pick up any book? If so, we would hope for a work that offers a intricate experience of thought and judgment, like White's reading of the *Crito* offered Teachout. By my reading, Teachout fittingly responded to White's text with a text that offered a similar intricate experience of thought and judgment. I suggest that we should respond in a like manner. Whatever the case, we will do well to deliberate on the basic questions we ask ourselves when we begin to read and write.

* * *

White's *The Edge of Meaning* begins with some suggestive remarks about the activity of questioning. Instead of 'What does it mean to think like a lawyer?', which is a founding question for *The Legal Imagination*, we have something like 'What does it mean to think like a human being?' as a founding question. White writes:

I think that in each of us there is a part of our being that is the source of mental life and imagination; that, without our being wholly aware of it, in this part of the self we are constantly asking a set of questions about the world, of which the deepest is the question of meaning as I have defined it above, namely, whether we can find or make an adequate way of imagining the world, and the self and others within it; that to ask this question is to involve us in trying to respond to it, which in turn brings us to face the adequacies and inadequacies of the languages we are given to speak, of the cultures we inhabit, and the constraints imposed on us by nature as well; that our engagement with these questions is for the most part unconscious, but can be made the object of attention and thought, particularly

⁴⁴ For a discussion, see G C Fiumara, *The Other Side of Listening: A Philosophy of Listening* (1990).

through the careful reading and study of certain works of literature and other forms of art, including the art of law; indeed that to make us aware of this process and our own participation in it, and to teach us how to think about and criticize our own performances of it, is one of the central functions of art; and, finally, that we pursue these questions not alone but in relation to others, with whom we make real whatever we manage to learn. The process to which I am drawing attention is thus one in which we all engage, all the time, but do so for the most part outside the field of conscious awareness—it is a piece of that rich and complex life that takes place in the ocean of the mind, beneath the surface on which we consciously live. But it does manifest itself constantly in what we say and do; not explicitly, but in our performances with language and each other.⁴⁵

Our 'meaning' does not always jell with 'what we say', and we might do well to attend to this ordinary experience, even if we do not aspire to become philosophers of consciousness. Shall we compare the mind to an 'ocean'? The ocean metaphor certainly seems more fitting than the machine metaphor. Those who promote the dominant image of *Homo economicus* might appear to be satisfied with the machine metaphor, but White is not. With the mind imagined as a machine, language becomes reduced to a machine too. This way of imagining may be valuable for certain purposes, such as producing economic models that generate determinate solutions, but it does have important limits, not the least of which is working out who we humans are becoming and should become through our imagining. White and his imagined reader are attending to this 'working out'. What can we 'make real' with them?

In a review of *The Edge of Meaning*, Patrick Brennan gives attention to what White says about the activity of questioning. One fragment is as follows:

The Edge of Meaning . . . is animated by a 'deepest question,' and concerns the 'part of the self' in which 'we are constantly asking a set of questions'. White thus contributes a desperately needed corrective to the underappreciation of the place of *the question* in human living. The operative assumption, subject to the rare exception, is that the asking of question is epiphenomenal to human knowing, the latter occurring (if at all) by the mind's eye taking a sort of mental look. The usual, if unarticulated, thinking is that knowing occurs by the mind's getting its version of 20/20 vision – 'the view from nowhere,' with nothing allowed to obnubilate the mental looks. But notice this stark fact: the mind that asks no questions,

⁴⁵ *The Edge of Meaning* xi-xii.

reaches no answers. . . . Without asking, 'What does this mean?' or 'What should I do?', I shall not know. Period. But I do ask such questions, all the time, as do you. (Do you not?) We ask these questions because we desire to know. In calling attention to the foundational position of our questioning, White stands in the tradition of Aristotle, who began his *Metaphysics* with a wondrous observation: 'All men by nature desire to know.' As one contemporary commentator explains, 'This radical dynamism, both longing and capacity, is inborn within us, defining our nature as human and not merely animal.' And another twentieth-century philosopher, Bernard Lonergan, refines the point as he develops the implications of Aristotle's locating erotic desire at the root of our human knowing: '[Our] primordial drive [to understand] is the pure question. It is prior to any insights, any concepts, any words, for insights, concepts, words, have to do with answers; and before we look for answers, we want them; such wanting is the pure question.'

We want to be knowers, even know-it-alls. To be sure, we can be lazy, and often we are even proud. So, at times we attend more to answers previously amassed than to the normative significance of our insatiable asking of fresh questions in our quest for new answers. Eager to take a rest, we codify our answers, transmuting questions' answers into collections of propositions. . . .

[I]n White's work, there is . . . an honest appropriation of what we are doing when we are making and discovering meaning, including meaning that amounts to law. White cuts through all the nonsense by going to the root of both problem and solution. As White shows time and again – from the meaning of a Greek sentence to the meaning of a statute – the criteria for giving (or withholding) assent or consent are given on the side of the human subject. Nothing is evident, let alone self-evident, except to a mind that has satisfied, as to the issue in question, its desire to know. When propositions are not self-authenticating, when starting points are not self-moving marionettes, when reality isn't forcing itself upon us (and it never forces itself upon the mind, we can always deceive ourselves) – then, we are remitted to the process of asking and answering questions, answers being achieved only by the subject's satisfying the desire to know. 'It is,' White says, 'a matter of having questions, and pursuing them as far as one can'.⁴⁶

What does this mean? What should I do? Do we really 'ask such questions, all the time'? How does Brennan know? Might we have in that passage the voice of a know-it-all? Or might we have the voice of a fellow knower, who is inviting his reader to

⁴⁶ P Brennan, 'Meaning's Edge, Love's Priority' (2003) 101 *Michigan Law Review* 2060, 2066-69 (page references and footnotes omitted).

attend to the questions that are at work within her? Are not our questions here confirmatory evidence for his claim about our basic 'desire to know'? How do we know? When should we be satisfied in 'giving consent' to his claims about the primacy of questioning? What if we 'deceive ourselves'?

* * *

In 1994, I was invited to contribute to a volume commemorating the centenary, in 1999, of Thorstein Veblen's *The Theory of the Leisure Class* and John Commons' *A Sociological View of Sovereignty*. The volume would commemorate these works as founding the school of thought which eventually became known as 'institutional economics'. I elected to write on Commons' work,⁴⁷ for in it were roots of his analyses of the legal foundations of capitalism, analyses that interested me. These analyses outlined the process by which the customs relating to 'property' and 'liberty' that prevailed under feudalism evolved into very different customs under capitalism, customs that are in a continual process of evolution. Commons identified a structural reciprocity between language and culture, with linguistic evolution associated with cultural evolution. Center stage in Commons' work is 'the common-law method of making law', an institutionalized hearing process involving reasoning by analogy, in which language and culture are modified in the process of resolving conflict (*Activity). Commons' efforts to connect this process with economics, for me, offer to deeply enrich the discipline.

In the process of writing on Commons, I learned that both the subject matter and the style in which he wrote have long been considered unusual. I read and heard many claims to the effect that he was against 'theory'. In this regard, significant aid in making sense of the work of Commons and other institutionalists has been provided by Walter Neale's identification, in *Language and Economics* (1982),⁴⁸ of their work as being grammatically different from mainstream economists. Neale suggests that economists should attend simultaneously to their grammar and to their questions:

⁴⁷ The outcome is my 'Sovereignty and Withholding in John Commons's Political Economy', in W J Samuels (ed), *The Founding of Institutional Economics: The Leisure Class and Sovereignty* (1998) 47.

⁴⁸ W C Neale, 'Language and Economics' (1982) 16 *Journal of Economic Issues* 355.

Nouning has contributed to confusion about meaning, and to confusing word order with cause. It is important to distinguish between value as a noun (thing), which it is not, and *to value* as a verb. The former generates a bunch of non-questions, such as the classical economic question, 'Why do diamonds have more value than bread?' Diamonds do not *have value*, they have mass, density, reflectivity, and chemical composition, but they *do not have value*. Instead of asking, 'Why does a diamond have value?' one should be asking, 'How do people value diamonds?' And answering by saying, 'They value them by stealing them, buying them, insuring them, killing for them,' and so on. Stealing, buying, insuring, killing are *how* people value diamonds.

In standard economics *nouns are explanations*: utility, preference, satisfaction, revealed preference, tastes. As English speakers have spoken in terms of *having values*, so economists have spoken about having tastes We do *not have tastes*. We enjoy, we dislike, we remember, we feel. The structure of our language encourages us to account for an event by a noun being or doing, or by a noun doing something to another noun. 'Taste causes people to eat apples.' I recognize 'people' and 'apples' as noun things. But *taste*? I have always found rather appealing Gilbert Ryle's asking whether there would be any way of persuading an angler to have the satisfaction or utility of fishing when not allowed to go fishing. It is quite clear that anglers enjoy fishing; but an enjoyment does not come from fishing or because of fishing – the pleasure *is* the process, which means *doing* (verbing, fishing).

One way to understand what institutional economists have been about is to see them as rejecting nouning and arguing for processual verbing. . . . Institutionalists have spoken and written in the English language, and perforce they have used nouns; but, in the terms in which I have been arguing, they have come as close as is possible to analyzing economies as verb processes. . . . We . . . feel frustrated when standard economists [say] . . . 'You criticize economic theory, but you do not provide an alternative theory.' . . . I submit that it is not the failure of institutional economists to provide an alternative, but rather that the demand for an alternative theory *implicitly*, and very likely unconsciously, includes a demand for an alternative that allows logical derivation of the necessary or the best. . . . In the terms in which I have been speaking, they are asking us to slot alternative nouns into their noun slots, but institutionalists are *not* going to put *supreme court* into the present slot for *tastes*. . . . 'Value is a *process of valuing*,' said Commons. The noun that sums it all up is a noun about verbing: *process*.⁴⁹

⁴⁹ Ibid 363-68.

For Neale, mainstream economists want ('demand') the static, the reduced, and this want manifests itself in a will to noun, along with problematic questions. This want is out of place in a process-orientated economics, one in which 'economy' is not a noun but a verb – 'economy becomes economizing' said Commons.⁵⁰ A shift of emphasis from nouns to verbs, we can be confident, will not be a welcome movement for those who want a neatly identifiable and fixed 'field' of 'economics'. A call to pay attention to grammatical habits, we can also be confident, will not be welcome call for those who are devoted to a form of 'rationality' that has no place for habit (*Rationality) and no place for asking questions about the value of questions.

Richard Posner has sought to construct what he calls 'Law and Economics' on this form of rationality. Posner's Law and Economics has a highly restricted pale. Consider, for example, these remarks by Posner in an essay *The New Institutional Economics Meets Law and Economics* (1993):

The adjective 'new' implies that there was a previous institutional economics, and of course there was, and still is. The best known of the original institutionalists, Thorstein Veblen and John R. Commons, flourished in the early decades of this century. . . . The leitmotif of the old institutional economics was the rejection of classical economic theory. I have not read extensively in the literature of the old institutional economics but what I have read confirms Coase's dismissive characterization: 'without a theory they had nothing to pass on except a mass of descriptive material waiting for a theory, or a fire'.⁵¹

Posner would have done well to question the justness of Coase's characterization. Commons did explicitly offer a 'theory' relating to, for example, the direction of cultural cum legal-economic evolution. This 'theory' simply does not come in the conventional 'scientific' form, certainly not one that can readily be placed in the mechanistic rationality revered by Posner. Doing justice to Commons, as Neale suggests, requires making some distinctions and asking the right questions.

If Posner had attempted to attune himself to Commons' work, he might have had an experience that placed him well for tuning in to White's work, especially as it concerns 'theory'. In *Law and Literature* (1988), Posner says this:

⁵⁰ J R Commons, *Legal Foundations of Capitalism* (1924; 1995) 8.

⁵¹ R A Posner, 'The New Institutional Economics Meets Law and Economics' (1993) *Journal of Institutional and Theoretical Economics* 73.

Obviously White is unhappy with where he thinks economic analysis is leading the law But to say that instead of guiding by the light of economics judges should 'decide a case as well as they can' is to beg the question. White's dislike of theory is not much of a theory. By what signs shall we recognize a judicial job well done? . . . Although the law and literature movement can contribute to the understanding and improvement of judicial opinions by close attention to the style and craft of particular judges and particular opinions, broad appeals to the humane values in literature, a Manichaeian conception of the relationship between the humanities and the social sciences, and a blanket rejection of all theories are unlikely to be productive.⁵²

Not least for the purpose of defining 'close attention' through his own performance, Posner could have spoken not of White's 'dislike of theory' but of his *criticism of certain kinds of theory* and of his insistence that judges ought to keep *all kinds of theory* in their due place in the process of making authentic ('as well as they can') judgments. If Posner had been able to make distinctions in relation to different kinds of theory, he might have been able to avoid using 'economics' as a blanket term that masks a great number of diverse ways of imagining the world and 'the economy' in it. If Posner had let go of his blanket term he might have been able to get into a position to join White in imagining the law as an activity that seeks to manage and do justice (through 'close attention') to diverse ways of imagining the world. If Posner could have for a moment imagined the law this way, he might have sensed that for White to say that judges should 'decide a case as well as they can' *may not* 'beg the question' to the extent that the utterance is a response to a set of fruitful questions, which up to now Posner seems unable to imagine.

⁵² R A Posner, *Law and Literature: A Misunderstood Relation* (1988) 315 (footnotes omitted).

Rationality

Joseph Stiglitz and Carl Walsh's textbook *Economics* (2002) opens with a chapter titled 'Thinking Like an Economist',¹ in which they claim that 'there is a distinctive way that economists approach economic issues'.² This 'way' is centered on 'the rationality assumption', which is this: 'people weigh the costs and benefits of each possibility whenever they must make a choice', weighing that is done 'in pursuit of their own *self-interest*'.³ We can expect the direction of the 'self-interest' of different people to differ:

Of course, different people will have different goals and desires. Sarah may want to drive a Porsche, own a yacht, and have a large house; to attain those objectives, she knows she needs to work long hours and sacrifice time with her family. Andrew is willing to accept lower income to get longer vacations and more leisure time throughout the year.⁴

The term 'self-interest', in this context, does not necessarily mean 'selfish' but that each person works out her own 'preferences'. In this schema, 'rationality' is a reasoning process that consists of identifying items of potential consumption and calculating their 'value' in terms of some common denominator (usually money). Each person is assumed to be capable of evaluating alternatives, an assumption that can be stated as formal axioms.⁵ The use of 'rationality' does not extend to judgments of 'value':

Economists make no judgment about whether Sarah's preferences are 'better' or 'worse' than Andrew's. They do not even spend much time asking why different individuals have different views on these matters, or why tastes change over time. These are important issues,

¹ J E Stiglitz and C E Walsh, *Economics* (1993; 2002) (3rd ed) 24.

² Ibid 25.

³ Ibid 26.

⁴ Ibid.

⁵ The axiom of comparability: A 'rational' person is said to be capable of ranking any pair of bundles according to preference or indifference – there cannot be a claim such as 'I don't know which bundle I prefer, nor if I prefer them equally'. The axiom of transitivity: If a person prefers bundle A over bundle B and also B over C, then A must be preferred over C.

but they are more the province of psychology and sociology. Economists are concerned with the consequences of these different preferences.⁶

Many economists would separate economics from 'the province of psychology and sociology' upon the basis of 'rational' behaviour. We might do well to inquire into the 'rationality' of this basis. How might we do a 'rational' inquiry?

Economists are in fact divided on the merits of the rationality assumption and its due place in economics.⁷ Stiglitz and Walsh ask no questions about why different economists have different positions on these matters, or why these positions might change over time. These are important issues, at least to some economists, and these issues arguably should be the 'province' of economics. Economists, it seems to me, should be concerned with the consequences of these different positions.

Stiglitz and Walsh's silence here might make it seem 'natural' for them to not even to have the need to justify the rationality assumption and their use of it. Their version of 'economics' has thus become 'economics'. They offer their reader nothing on the creative, imaginative aspect of thinking that gave rise to what they call 'thinking like an economist' and that is required for engaging with economists who dispute their version of it. A more self-reflective and integrated economics would at the very least have the faculty of the imagination as part of a definition of rationality.

One distinctive feature of White's work is its numerous stimulating interchanges with the word 'rationality'. This entry engages with several of these interchanges.

* * *

In a sub-section in *The Legal Imagination* titled 'the language of rationality', White provides his reader with the opportunity to work out a way of talking about 'judicial rationality'.⁸ As 'an example for analysis', he directs his reader to the opinions in *Griswold v Connecticut*.⁹ Here the majority of the United States Supreme Court held unconstitutional a Connecticut statute of 1879 that prohibited the use of birth control devices, even by married couples. As discussed above (*Metaphor), there were four opinions for the majority position (Justice Douglas for the Court, Justices Goldberg,

⁶ Stiglitz and Walsh, op cit, 26.

⁷ See J G T Meeks (ed), *Thoughtful Economic Man: Essays on Rationality, Moral Rules, & Benevolence* (1991).

⁸ *The Legal Imagination* 707.

Harlan, and White concurring) and two dissenting opinions (Justices Black and Stewart). The opinions differ significantly in method and voice, and thus they provide excellent material for White's reader to do some working out of fundamental issues.

Harlan's opinion makes reference to his earlier opinion in *Poe v. Ullman*.¹⁰ In a footnote White writes: 'You are urged to examine Justice Harlan's most impressive opinion in that case.¹¹ Let's do so here.

The *Poe* case concerned the same Connecticut statute. The health and well-being of a Mrs. Poe was at stake if she became pregnant. She and her husband claimed that the statute violated the Due Process Clause of the Fourteenth Amendment ('nor shall any State deprive any person of life, liberty or property, without due process of law'). The majority of the Court ruled that the case presented no justiciable controversy as the State had not enforced the statute. Harlan dissented. Some fragments from his opinion are as follows:

The appellants . . . ask that it be adjudged, contrary to what the Connecticut courts have held, that such laws . . . violate the Fourteenth Amendment, in that they deprive appellants of life, liberty, or property without due process.¹²

[B]ecause it is the Constitution alone which warrants judicial interference in sovereign operations of the State, the basis of judgment as to the Constitutionality of state action must be a rational one, approaching the text which is the only commission for our power not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government. *McCulloch v Maryland*, 4 Wheat. 316 . . .¹³

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance

⁹ *Griswold v Connecticut* 381 US 479 (1965).

¹⁰ *Poe v Ullman* 367 US 497 (1961).

¹¹ *The Legal Imagination* 717.

¹² *Poe*, op cit, 523.

¹³ *Ibid* 539.

struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

It is this outlook which has led the Court continually to perceive distinctions in the imperative character of Constitutional provisions, since the character must be discerned from a particular provision's larger context. And inasmuch as this context is not one of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, see *Allgeyer v Louisiana*, 165 US 578, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment¹⁴

Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no 'mechanical yard-stick,' no 'mechanical answer.' The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take 'its place in relation to what went before and further [cut] a channel for what is to come.' *Irvine v California*, 347 U.S. 128 The matter was well put in *Rochin v California*, 342 US 165 . . . :

'The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process These are considerations deeply rooted in reason and in the compelling traditions of the legal profession.'¹⁵

¹⁴ Ibid 542-3.

¹⁵ Ibid 544-5.

This enactment involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of 'liberty,' the privacy of the home in its most basic sense, and it is this which requires that the statute be subjected to 'strict scrutiny.' *Skinner v Oklahoma*, supra (316 US at 541).¹⁶

Though undoubtedly the States are and should be left free to reflect a wide varieties of policies, and should be allowed broad scope in experimenting with various means of promoting these policies, I must agree with Mr. Justice Jackson that 'There are limits to the extent to which a legislatively represented majority may conduct . . . experiments at the expense of the dignity and personality' of the individual. *Skinner v Oklahoma*, 316 US 535 . . . In this instance these limits are, in my view, reached and passed.¹⁷

For Harlan, if constitutional decision making is to be in any sense 'rational', then one must seek unifying principles to link diverse decisions. Echoing Chief Justice Marshall, he resists 'approaching . . . the Constitution . . . in a literalistic way' because the 'sparse . . . terms' used were of a kind that were necessary for 'the basic charter' that contained 'principles of government'. Harlan defines the Court as the appropriate forum for responding to '[e]ach new claim', which will engage with a tension between 'respect for the liberty of the individual' and 'the demands of organized society'. The role of the judiciary is, he claims, to engage in the 'traditions' of the country's law, to guide a 'living' process.

The talk of 'tradition' as 'a living thing' brings to mind Hans-Georg Gadamer's efforts to rehabilitate tradition. Gadamer's 'tradition' breaks the objective-subjective dichotomy. His denial of objective interpretation did not mean that he imagined interpretation to be a subjective process. Tradition defines the ground and hence 'horizon' that an interpreter is placed, as well as determining 'in advance both what seems [to be] . . . worthy inquiring about and what . . . appears as an object of interpretation.'¹⁸ 'Tradition', as one interpreter of Gadamer puts it, 'is the medium in which we swim . . . and through which we exist.'¹⁹ We cannot be outside a tradition, for that place is outside of history and time. Being within a tradition is to be placed

¹⁶ Ibid 548.

¹⁷ Ibid 555.

¹⁸ H Gadamer, *Truth and Method* (1975) 268; quoted in B Sherman, *Hermeneutics in Law* (1988) 51 *Modern Law Review* 386, 389.

¹⁹ Sherman, *ibid*.

within an 'horizon' that shapes all understanding, whether we are aware of it or not. We will do well to remember that the composers of legal texts such as the Constitution were placed in a different horizon. Fidelity to the texts demands that we risk our 'prejudices' in our engagement with them.

White comments on Harlan's *Poe* opinion in his reading, in *Acts of Hope*, of *Planned Parenthood v Casey* (*Hope), in which the Court drew on Harlan's dissent. White says this about the dissent:

Justice Harlan . . . found in the due process clause . . . an injunction to the Court to insist upon the protection of those rights that have been fundamental to our society. To determine these, it is not enough to look within the self, at one's own values; one must look without, at our history and culture. The Constitution chose to protect these rights under such vague language because it is in the nature of things they cannot be spelled out more precisely. Their definition and elaboration is entrusted to the Court because the way the Court works – by the decision of particular cases, carefully argued on both sides; by the refusal to decide more than is actually before it; by the resulting particularity of the judgment, informed as it is by the ways in which conflicting values present themselves in real cases – entitles it to a trust, and an authority, that a more political, or less disciplined, branch of government would not have. On Harlan's view, the idea that the Constitution should be regarded as speaking in plain English and saying just what it means is dispensed with, just as it was by Brandeis, and for much the same reason: that the Constitution is meant to serve the highest purposes of government and collective life and that these cannot be reduced to a code. Instead, the Court must accept responsibility for judgment, which for Harlan means a responsibility to educate itself at the hands of its own past. His image of the cultural process that is wider than any person, yet entails principles of its own transformation, is familiar to us from Hale; and as Harlan himself sees, the extraordinary duty and privilege of the judge is to reconstitute this source of authority in his own prose. The line between self and world is in this way blurred, as the mind of the judge is partly made by the very material it transforms.²⁰

This opinion is perhaps the classic definition of a certain view of 'due process': Harlan refused to reduce it to a code, or to specific rules or practices of the past—for the essence of liberty cannot be protected that way—yet at the same time refused to see it simply as the imposition of contemporary or evolving political values. The task of the judge, as Harlan

²⁰ *Acts of Hope* 159-60.

defined it, is to engage with the traditions of the law and of our country in a responsive and responsible way; to defer in all reasonable ways to the judgments of others; to educate, and thus transform, his own mind by full consideration of what others have said and done; and, in a case which calls for it, to make his judgment whether the state has interfered with a liberty defined by that tradition. As Hale did too, he sees an essential part of the tradition in its principles of self-transformation. Conservation requires change.²¹

Harlan, by White's reading, renders problematic a collection of simple binary oppositions, including inside versus outside, self versus other, literal versus figurative, reason versus tradition, and continuity versus change. These oppositions, as Bentham understood well,²² enable us to carve up and manage the kaleidoscopic world within their either/or extremes. Whatever 'rationality' there is in this lifeless world, it cannot be a ground for trying to be rational in the 'real' world. What is called for is a literary performance in navigating the inevitable messy circumstances, a performance that will self-consciously be an act of hope for being understood and for being judged 'rational'.

* * *

In a section of *The Legal Imagination* titled 'The Activity of Argument', White directs us to the moment in Thucydides' *History of the Peloponnesian War* (circa 402 BCE) when, in the 'Melian dialogue', the Athenian representatives renounce all appeals to 'justice' in favour of the concerns for 'self-interest'. To this and a related matter White asks, 'How do you respond? Has argument any function here, or is there simply nothing to be said?'²³ In the interests of augmenting rationality talk (especially in economics), let us pursue that question.

Thucydides' *History* is a contemporary account of a long life-and-death struggle between Athens and Sparta that took place between 431 and 404.²⁴ Thucydides informs us that after a period of warfare, Sparta and Athens, in 445, entered a treaty providing for thirty years' peace. This treaty listed the allies of each city, and it provided that neither could form an alliance with the allies of the other, though

²¹ Ibid 172-3.

²² Bentham expressed the belief that to achieve certainty it was necessary to classify all knowledge into mutually exclusive 'bifurcations'. See H J Berman, *The Interaction of Law and Religion* (1974) 170 (n 4). 'According to Bentham, either a thing is so or it is not so; either an entity is real or it is fictitious, etc.'

²³ Ibid 843.

²⁴ Thucydides, *History of the Peloponnesian War* (ed and trans Rex Warner) (circa 402 BCE; 1972).

neutrals could be admitted as allies of either side. This was the context in which a dispute between Corcyra and Corinth arose. Corinth was defeated in a brief battle and sought revenge. Corcyra, who had no alliances, sent a delegation to Athens to ask for an alliance; Corinth sent a representative to resist them. Thucydides recorded the speeches. In reference to the treaty, the representatives of Corcyra stated:

It is not a breach of your treaty with Sparta if you receive us into your alliance. We are neutrals, and it is expressly written down in your treaty that any Hellenic state which is in this condition is free to ally itself with whichever side it chooses.²⁵

The representative from Corinth responded with an appeal to the intent rather than the letter of the treaty:

[T]his neutrality of theirs, which sounds so innocent, was in fact a disguise adopted . . . to give them a free hand to do wrong themselves, making away with other people's property by force And now . . . they have come to you and are asking you not so much for alliance as for complicity in their crime. They are asking you to welcome them at a time when they are at war with us. . . . Though there may be a clause in the treaty stating that any city not included in the original agreement is free to join whichever side it likes, this cannot refer to cases where the object of joining an alliance is to injure other powers; it cannot refer to a case where a city is only looking for security because it is in revolt.²⁶

These speeches in Thucydides' *History* mark the start of a degeneration of debate. And as the debate degenerates, so does social life. This is explicit in a famous passage on the effects of the civil wars that swept through Greece as a consequence of the Peloponnesian War, beginning with the civil war successfully instigated by Corinth at Corcyra.²⁷ Thucydides writes:

There was death in every shape and form. . . . There were fathers who killed their sons; men were dragged from the temples or butchered on the very alters To fit in with the change of events, words, too, had to change their usual meanings. What used to be described as a thoughtless act of aggression was now regarded as . . . courage . . . ; to think of the future and

²⁵ Ibid Bk 1, s 35.

²⁶ Ibid s 37-40.

²⁷ Ibid Bk 3, s. 81.

wait was merely another way of saying one was a coward; any idea of moderation was just an attempt to disguise one's unmanly character; ability to understand a question from all sides meant that one was totally unfitted for action. Fanatical enthusiasm was the mark of a real man, and to plot against an enemy behind his back was perfectly legitimate self-defence. Anyone who held violent opinions could always be trusted, and anyone who objected to them became a suspect.²⁸

That passage, as stated in *When Words Lose Their Meaning*, can serve as a point of departure for attending to relations between language and character and community:

One way to see what is so terrible about the world Thucydides describes is to ask what place you would have in it. . . . [There] would be the threat, in some sense the certainty, that to live in this world would lead to central changes within the self. One cannot maintain forever one's language and judgment and feelings against the pressures of a world that works in different ways, for one is in some measure the product of the world. . . . [This] alteration of language . . . is not merely a lexical event, and it is not reversible by insistence upon a set of proper definitions. It is a change in the world and the self, in manners and conduct and sentiment. Changes of this kind are complex and reciprocal in nature. The change in language that Thucydides records, for example, is in part caused by events of another kind, which are only partly verbal—those of the civil war; but the changes in language in turn contribute to the course and nature of that war and do much to define its meaning. The process is reciprocal in another sense as well, for at every stage the change is effected, knowingly or not, by the action of individual people, who at once form and are formed by their language and the events of their world. When language changes meaning, the world changes meaning, and we are part of the world.

One response to the world is to make a text about it, a reorganization of its resources of meaning tentatively achieved in a relation, newly constituted, between reader and writer. This is a way of acting in the world and on the world by using the language of the world. *Thucydides'* History is a response of this kind . . .²⁹

How might White's reader experience Thucydides' story if she did not 'ask what place she would have in it'? A person's 'experience' of a text is not independent of the questions that she asks whilst reading it. We can be sure White hopes that his reader

²⁸ Ibid Bk 3 s 81-2.

²⁹ *When Words Lose Their Meaning* 3-4.

will carry across the 'place' question to her reading of White's reading, for it offers a line of inquiry into the nature of 'self' and 'other' and the relation between them.

Of particular interest to White are the consequences of the decision by Athens to rule out questions of 'justice' in her relations with other cities and to base all public conduct in 'self-interest'. The decision leads to the disintegration of the larger community of states and of the Athenian polity itself. White identifies two 'lessons':

[O]ne of the lessons of this text—and I for one think it is a universal truth—is that it is as irrational to speak of self-interest without recognizing the claims of justice as it is to speak of justice without recognizing the claims of self-interest. What might be called the field of justice-talk can in fact be said to live in a tension between two contrary tendencies, each acting on the other: the claims the self makes on the world and those the world makes on the self. One part of the lesson is that the language of justice cannot demand from the self what it cannot give. This is the Athenian claim at Sparta, and it is unanswerable. But the other part of the lesson is equally unanswerable: it is that the self cannot function without a language in which it and its interests can be defined; the self is nothing without a culture and a community that establish others and their interests. The most self-interested person in the world thus has an interest in maintaining a language that alone can give reality and meaning to his wishes.

Justice and self-interest can indeed be seen as two sides of the same thing, as topics each of which necessarily implies the existence and validity of the other (as 'form and substance' do, or 'straight and curved'). There is a structural tension between them and a temptation to abandon one in favor of the other, as we saw the speakers in the Corcyrean debates start to do. But it is only in the tension between them that a coherent world of social action and meaning can be made. It is that tension—that reciprocal recognition of claim and limit—that makes possible the adjustments by which a culture can change without collapsing.

A second lesson of a similar kind, equally important to us, also emerges from the text. It begins with the Athenian claim that talk about justice meaningfully go on only between equals in power, as a kind of substitute for the exercise of force, since superior power will not be restrained except by power. This kind of remark makes us uncomfortable, but it is hard to refute; and it is supported by the demonstration in this text that the related practices of alliance, gratitude, and compassion, even honor, also have equality as their premise. This seems to mean what Athens makes it mean: that in a world of unequal power, talk about justice has no place. But could equality be seen not as the factual precondition of the discourse of justice but as its product, as something that it creates and makes real in the

world? Could Athens, that is, have recognized that even cities unequal in power may have an equal interest in maintaining the discourse that gives them identity and community, that indeed makes their life and competition possible? This recognition would have led Athens to think very differently of herself and of her situation at Melos, for example, and to talk differently to the Melians and herself; it would have been the invention of a new idea, equality under the law. That recognition would have made real in the world of law and politics something analogous to what the *Iliad* creates in the mind of its reader: a recognition of the common humanity and equal value of all people.³⁰

That passage may provide a modern economist with an 'aha' experience, a realization that one's way of thinking has been awry. It is common for economists to talk, in the name of 'rationality', of the motive of 'self-interest' as if can be disconnected from questions of justice. (The assumption is made that the self is a fixed and hence isolated quantity, an assumption challenged by White.³¹) Such a disconnection readily flows from the basic image at work in the language of 'neoclassical' economics, namely that of the machine: the world is a machine, people ('autonomous individuals') are 'rational' calculating machines, and language can and should (for 'efficiency' purposes) function a tool with which people can communicate with each other about things 'out there' in the world. White's basic organic image, a central seed of which is the metaphor of 'tension' (used four times within a space of twenty lines), fundamentally challenges this image (*Image; Metaphor). A great deal is at stake, for many economists are confidently applying economic theory to law whilst seemingly oblivious to the fact that the theory offers an image of the world that predates 'the invention of a new idea, equality under the law'. It seems to me to be remarkable that

³⁰ Ibid 91-2.

³¹ John Dewey, in his *Democracy and Education* (1916; 1966), offered a similar challenge. In particular, he questions those who create a 'rigid dilemma between acting for an interest of the self and without interest.' He goes on to say:

If the self is something fixed antecedent to action, then acting from interest means trying to get more in the way of possessions for the self – whether in the way of fame, approval of others, power over others, pecuniary profit, or pleasure. Then the reaction from this view as a cynical depreciation from human nature leads to the view that men who act nobly act with no interest at all. Yet to an unbiased judgment it would appear plain that a man must be interested in what he is doing or he would not do it. (351)

Dewey would have us imagine 'the self . . . not [as] something ready-made, but something in continuous formation through choice of action' (351). And he would have us imagine 'interest' as 'that which connects two things otherwise distant' (127). Connecting 'self' and 'interest': 'We say of an interested person both that he has lost himself in some affair and that he has found himself in it' (126). Dewey's language lends itself well to talk about justice, with two or more selves becoming 'lost' and 'found'.

'equality under the law' is an invention and that economists have inadvertently invented a theory that eliminates it. If Adam Smith were alive today, he might well be eager to revisit his discussion of the disadvantages of specialization.³²

* * *

In 2004, I was asked to do a small series of lectures in two economics classes, one of which was a first-year class and the other a third-year class. Both classes required me to introduce or to remind students about the 'Prisoner's Dilemma game', which can be readily applied to just about any topic studied as 'economics of . . .'. (The third-year students were quite familiar with the game, whereas many if not most of the first-year students were unfamiliar with it.) To this end, I asked this question in both classes:

Imagine that you are a certain Nelson Mandela, who has a deep friendship with Walter Sisulu. Both you and Sisulu are freedom fighters in South Africa, committed to resisting racist laws, first through wholly legal means, then through non-legal means. You both ultimately engage in acts of sabotage, exposing yourselves to imprisonment if you get caught. The state manages to get only enough evidence to convict you both of a relatively minor offence, for which the penalty is 5 years in jail. You and Sisulu are in separate cells; both are told that if one confesses while the other one remains silent, the confessor will only get 1 year in jail, while the other spends life in jail. If both confess, both will get an intermediate sentence of 10 years. Will you confess or remain silent? Explain.

A large majority of the third-year students responded with 'confess'. The standard explanation was confidently expressed. Each prisoner is 'rational', considering costs and benefits that accrue directly to themselves; that is, they are 'self-interested'. Irrespective of what the other prisoner does, each prisoner gets a shorter sentence by

³² See A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776; 1898) Bk V, Ch 1, Art III. Here is a suggestive passage:

'The man whose whole life is spent in performing a few simple operations, of which the effects, too, are, perhaps, always the same, or very nearly the same, has no occasion to exert his understanding, or to exercise his invention in finding out expedients for removing difficulties which never occur. He naturally loses, therefore, the habit of such exertion, and generally becomes as stupid and ignorant as it is possible for a human creature to become. The torpor of his mind renders him, not only incapable of relishing or bearing a part in any rational conversation, but of conceiving any generous, noble, or tender sentiment, and, consequently, of forming any just judgment concerning many, even, of the ordinary duties of private life.'

We might wonder what could happen to an economist who spends a great deal of time running models that have no meaningful place for 'habit' and 'just judgment'.

confessing. The game is one in which the pursuit of 'self-interest' is self-defeating: the 'dominant strategy' is to confess, and both prisoners would have been 'better off' remaining silent.

A relatively large proportion of first-year students responded with 'remain silent'. A non-standard explanation was tentatively expressed. Each prisoner had an 'interest' in over-turning the racist laws, and that could impact on their decision. Both had an 'interest' in 'justice' and in maintaining the friendship. And acts of 'trust' and 'commitment' were important here, and this could readily permit or lead to the more desirable outcome (from each of the prisoner's point of view) of lower jail sentences – with both remaining silent.

What sense might be made of the different responses? Are the first-year students more 'rational' than the third-year students? What might become of a person studying 'rational choice theory' without much attention to what it leaves out?

I suggested to both the classes that they would do well to read Amartya Sen's invitation, in his essay *Rational Fools* (1977), to consider connecting 'rationality' and 'commitment'.³³ Sen seeks to enrich talk about the nature of 'economic man' by distinguishing 'sympathy' and 'commitment'. Here is one suggestive passage:

If the knowledge of torture of others makes you sick, it is a case of sympathy; if it does not make you feel personally worse off, but you think it is wrong and you are ready to do something to stop it, it is a case of commitment. I do not wish to claim that the words chosen have any great merit, but the distinction is, I think, important. It can be argued that behavior based on sympathy is in an important sense egoistic, for one is oneself pleased at others' pleasure and pained at others' pain, and the pursuit of one's own utility may thus be helped by sympathetic action. It is action based on commitment rather than sympathy which could be non-egoistic in this sense. . . . In the terminology of modern economic theory, sympathy is a case of 'externality.' Many models rule out externalities [T]he existence of sympathy . . . would not require a serious revision of the basic structure of these models. On the other hand, commitment does involve, in a very real sense, counterpreferential choice, destroying the crucial assumption that a chosen alternative must be better than (or at least as

³³ A K Sen, 'Rational Fools: A Critique of the Behavioral Foundations of Economic Theory' (1977) 6 *Philosophy and Public Affairs* 317.

good as) the others for the person choosing it, and this would certainly require that models be formulated in an essentially different way.³⁴

Sen does not go on to offer a guide as to how theoretical models might be 'formulated'. He simply offers the 'thesis' of 'the need to accommodate commitment as part of behavior', not the least to explain why, for example, people 'frequently' work through the Prisoner's Dilemma in a way that economists define as 'irrational'.³⁵ Sen suggests that the 'rational' economic characters in the models may be 'fools', not these people.

In *Heracles Bow*, White offers a reading of Sophocles' *Philoctetes* (circa 409 BCE) that offers some food-for-thought about the constitution of a rational fool. (The play, as Alasdair MacIntyre notes in *Whose Justice? Which Rationality* (1988) was composed soon after a revolution that had 'shaken the Athenian democracy' and a series of military victories that provided it with 'renewed possibilities of preserving itself'.³⁶) Before hearing from White, let us work our way into the play.

First some background. Apollo had gifted to the demigod Heracles, son of Zeus, a bow that always hit its mark. Heracles, when he was in dying, gifted the bow to Philoctetes in return for lighting his funeral pyre. Philoctetes was thus well equipped when he later departed for Troy with his comrades on a military engagement. On the way, he accidentally stepped on sacred ground and had his foot bitten by a serpent. The wound was particularly nasty. His outbursts during waves of pain interrupted religious rituals, thus jeopardizing military success. The foul smell of the wound was extremely challenging for his comrades to tolerate his company. They ended up abandoning him on the deserted island of Lemnos.

The play begins nine years later. Philoctetes is still on Lemnos. His wound has not healed. His bow has enabled him to avoid starving. Odysseus, who abandoned him, has come to the island to get the bow, which according to the oracle of Helenus, is necessary for Greek military success at Troy. Odysseus, believing that Philoctetes will be extremely bitter about being abandoned and unwilling to help their campaign, devises a plan requiring the assistance of the young Neoptolemus, son of noble Achilles. Odysseus tells Neoptolemus about the abandonment and gives him

³⁴ Ibid 326-28.

³⁵ Ibid 341 and 344.

³⁶ A MacIntyre, *Whose Justice? Which Rationality?* (1988) 58-9.

instructions about gaining Philoctetes' 'trust' before offering him a passage home,³⁷ which may enable them to get close to his bow. Here is one passage:

Ensnare

the soul of Philoctetes with your words.
 When he asks who you are and whence you came,
 say you are Achilles' son; you need not lie.
 Say you are sailing home, leaving the Greeks
 and all their fleet, in bitter hatred. Say
 that they prayed you, urged you from your home,
 and swore that only with your help
 could Troy be taken. Yet when you came and asked,
 as by your right, to have your father's arms,
 Achilles' arms, they did not think you worthy
 but gave them to Odysseus. Say what you will
 against me; do not spare me anything.
 Nothing of this will hurt me; if you will not
 do this, you will bring sorrow on all the Greeks.
 If this man's bow shall not be taken by us,
 you cannot sack the town of Troy.³⁸

Odysseus sounds to me to be a man who knows what needs to be done (sack Troy) and how to do it (get the bow). The means includes lies. Can these be justified?

Odysseus insists that they have no alternative: force will fail against the bow, and Philoctetes would kill them if he knew who they were. Concerning ethics:

I know, young man, it is not your natural bent
 to say such things nor to contrive such mischief.
 But the prize of victory is pleasant to win.
 Bear up: another time we shall prove just.
 For one brief shameless portion of a day
 give me yourself, and then for all the rest

³⁷ Sophocles, *Philoctetes* (circa 409 BCE), in D Greene and R Lattimore (ed), *The Complete Greek Tragedies: Sophocles II* (1957) 71.

³⁸ Ibid 55-69.

you may be called most scrupulous of men.³⁹

The play is concerned throughout with the topic of justice.⁴⁰ What are we to think of one who suggests putting aside being 'just' for the aim of 'victory'? What are the consequences for a 'self' who accedes?

Neoptolemus objects to the plan, for it is not compatible with his basic conceptions of integrity: 'I would prefer even to fail with honor / than win by cheating.'⁴¹ Instead he urges the use of force or persuasion. Odysseus insists that deceit is only option that that in pursuing it Neoptolemus 'shall be called a wise man and a good.'⁴² This appeal to reputation seems to carry some force.⁴³ Neoptolemus reluctantly accedes.⁴⁴

Philoctetes sights Neoptolemus rowing to shore and is very eager to talk with him – the absence of ordinary conversation has been one of his most significant losses. He is delighted to hear Greek being spoken. Neoptolemus' noble connections and his story of injury at the hands of Odysseus create in Philoctetes a capacity for friendship and trust. The thought of Neoptolemus leaving leads to a plea by Philoctetes to be taken home to Greece. To tolerate the repulsiveness of the wound would, for Philoctetes, be an act of great kindness by Neoptolemus. He accedes.

Philoctetes fetches some items to take with him, including the bow. Neoptolemus asks to 'touch and adore it like a god'.⁴⁵ Philoctetes is more than happy to oblige:

³⁹ Ibid 79-85. Instead of the word 'just', the translation I am working with uses 'honest'. My modification draws from a version used by Martha Nussbaum, who is quoted below.

⁴⁰ M Nussbaum, 'Consequences and Character in Sophocles' *Philoctetes*' (1976) 1 *Philosophy and Literature* 25-37.

⁴¹ *Philoctetes*, op cit, 96.

⁴² Ibid 119.

⁴³ One critic has noted that there is some awkwardness in this talk about reputation. Whilst 'it is quite natural that Neoptolemus should be moved by an appeal to reputation, it is exceedingly strange that Odysseus should be the one to make the appeal. For Odysseus himself seems impervious to such considerations. What people say about *him* no longer bothers him.' A J Podlecki, 'The Power of the Word in Sophocles' *Philoctetes*' (1966) 7 *Greek, Roman, Byzantine Studies* 233, 238. Odysseus cannot really mean what he said about his lack of concern for his own reputation ('Say what you will / against me . . . Nothing of this will hurt me'), for if Neoptolemus distrusted him his words would not carry the persuasive force that they do.

⁴⁴ For a suggestive discussion of the opening interchange between Odysseus and Neoptolemus, see C Segal, *Tragedy and Civilization: An Interpretation of Sophocles* (1971). Concerning language: 'For Odysseus language is a carefully crafted tool to attain definite ends. In this aspect it reflects some late fifth-century Sophistic theories of language as an amoral medium for winning one's case, a . . . skill to be exercised without regard for law or justice' (333). Also: 'When language, corrupted, becomes the tool of a social leadership that has lost touch with its best ideals, the young, especially the gifted and sensitive young, are left the most confused, disorientated, alienated' (335).

⁴⁵ Ibid 658.

Your words are holy, boy. It is lawful,
 for you have given me, and you alone,
 the sight of the sun shining above us here . . .
 You may indeed touch my bow, give it again
 to me that gave it to you, proclaim that alone
 of all the world you touched it, in return,
 for the good deed you did. It was for that,
 for friendly help, I myself won it first.⁴⁶

We can be sure that those friendly words will affect Neoptolemus in a way that would not occur with the hard-shelled Odysseus.

Neoptolemus responds with these words: 'I am glad to see you and take you as a friend. / For one who knows how to show and to accept kindness / will be a friend better than any possession.'⁴⁷ Neoptolemus and Philoctetes, we can be sure, are entering a new level of discourse.

Philoctetes suddenly becomes silent with the onset of great pain in his foot. He then has convulsions of agony. When the attack subsides we witness Neoptolemus express feelings of compassion toward him: 'You most unhappy man, / you that have endured all agonies, lived through them, / shall I take hold of you? Shall I touch you?'⁴⁸ When the pain begins to subside, Philoctetes asks Neoptolemus to take care of the bow whilst he sleeps. Here is an act of trust:

If they should come in the time when I sleep,
 by the Gods I beg you do not give up my bow
 willingly or unwillingly to anyone.
 And let no one trick you out of it, lest you prove
 A murderer – your own and mine that kneeled to you.⁴⁹

This language, we can be sure, makes Neoptolemus uncomfortable. When Philoctetes asks him, 'What do you say?', Neoptolemus responds. 'I have been in pain for you; I

⁴⁶ Ibid 662-670.

⁴⁷ Ibid 671-2.

⁴⁸ Ibid 759-60.

⁴⁹ Ibid 769-772.

have been in sorrow for your pain.’⁵⁰ We can take this expression to be more than sympathy, for before him is a human being he is to deceive.⁵¹

During his sleep the Chorus encourages Neoptolemus to run off with the bow. Neoptolemus resists, stating that the oracle requires that Philoctetes take Troy:

Yes, it is true he hears nothing, but I see we have hunted in vain,
vainly have captured our quarry the bow, if we sail without him.
He is the crown of victory, him the God said we must bring.
Shame shall be ours if we boast and our lies still leave victory unwon.⁵²

Philoctetes wakes up and is delighted to see Neoptolemus still by his side, and he is deeply grateful for tolerating his cries and his wound.

With compassion for Philoctetes ever growing Neoptolemus becomes disgusted with himself and experiences a moment of crisis: ‘Zeus, what must I do? Twice be proved base, / hiding what I should not, saying what is most foul?’⁵³ Neoptolemus then does what he originally wanted to do: to try and persuade Philoctetes to come with them to Troy on his own volition, on the basis that this will be best for him and for them. However, Philoctetes refuses the offer of an opportunity of healing and distinction. He is devastated by the deception that has occurred, and he angrily demands that his bow be given back. Neoptolemus at first refuses, but then agrees to do so after Philoctetes makes a passionate plea.

Odysseus then appears and puts a halt to the return of the bow. Philoctetes hurls many stern words at him, including these: ‘May death in ugly form come on you! It will so come, / for you have wronged me, if the Gods care for justice.’⁵⁴ Philoctetes then has some words for the gods:

Land of my fathers, Gods that look on men’s deeds,
Take vengeance on these men, in your own good time,

⁵⁰ Ibid 806.

⁵¹ For a suggestive commentary on this scene, see M Nussbaum, ‘Invisibility and Recognition: Sophocles’ *Philoctetes* and Ellison’s *Invisible Man*’ (1999) 23 *Philosophy and Literature* 257. In particular: ‘the play offers an illustration of a thesis developed most extensively, but surely present already in Aristotle: namely, that our pity at the sight of painful events is an essential moral basis for our connection to others’ (268).

⁵² *Philoctetes* 839-42.

⁵³ Ibid 908-09.

⁵⁴ Ibid 1034-05.

Upon them all, if you have pity on me!
 Wretchedly as I live, if I saw them
 Dead, I could dream that I was free of my sickness.⁵⁵

None of what Philoctetes says seems to be of interest to Odysseus. At one point he says: 'We have these arms of yours / and do not need you, Philoctetes.'⁵⁶ Neoptolemus dissents. Following his own sense of propriety he elects to resist Odysseus, and he seeks 'to undo the wrong' that he has done.⁵⁷ Odysseus reaches for his sword in order to stop the bow being handed back. In response Neoptolemus reaches for his sword. Odysseus backs down, at which time he exits the play.

Neoptolemus then tries at length to persuade the angry and bitter Philoctetes to go to Troy. Here is some of what he has to say:

But men that cling wilfully to their sufferings
 as you do, no one may forgive or pity.
 Your anger has made a savage of you. You will not
 accept advice, although the friend advises
 in pure goodheartedness. You loathe him, think
 he is your enemy and hates you.
 Yet I will speak. May Zeus, the God of Oaths,
 be my witness! Mark it, Philoctetes, write it in your mind.
 . . .
 You will never know relief while the selfsame sun
 rises before you here, sets there again,
 until you come of your own will to Troy,
 and meet among us the Asclepiadae,
 who will relieve your sickness; then with the bow
 and by my side, you will become Troy's conqueror.⁵⁸

If we are inclined to want to live by a simple rule such as 'help friends and harm enemies',⁵⁹ we cannot escape the process of judging who is a friend and who is an

⁵⁵ Ibid 1040-44.

⁵⁶ Ibid 1054-55.

⁵⁷ Ibid 1223.

⁵⁸ Ibid 1319-25 and 1330-35.

enemy. At this point we may well feel with greater force the significance of Odysseus' disintegrative acts with words at the outset of the play. For his call to say anything will render the sincere talk of 'pure goodheartedness' hollow.

Philoctetes simply cannot be persuaded, for he is unable to contemplate 'living with my murderers.'⁶⁰ His refusal is the refusal of a deeply wounded man: 'It is not the sting of wrongs past, / but what I must look for in wrongs to come.'⁶¹

Philoctetes asks Neoptolemus to take him back to his 'home' away from home. To this, Neoptolemus accepts without hesitation: 'If you will then, let us go.'⁶² Philoctetes is moved: 'Noble is the word you spoke.'⁶³ The word 'noble' is fitting, for Philoctetes has asked the preeminent demand of friendship, to give up some vital interests to for another's wishes (wishes, furthermore, which seem senseless). (Here is an excellent example of what Sen calls a 'counterpreferential choice'.) Neoptolemus' consent apparently makes it impossible for the oracle to be fulfilled.⁶⁴

At this moment Heracles appears standing on the rocks above Philoctetes' cave. He tells Philoctetes that he has come 'to serve' him and to tell him of the plans of Zeus for him. After telling Philoctetes to go with Neoptolemus to Troy he says that it is here that 'you shall find there the cure of your cruel sickness, / and then be adjudged best warrior among the Greeks.'⁶⁵ And to Neoptolemus he says, 'You shall not have the strength to capture Troy / without this man, nor he without you, / but, like twin lions hunting together, he shall guard you, you him.'⁶⁶ (We may take it that Neoptolemus' act of friendship toward Philoctetes established the kind of egalitarian community ('twin lions') needed to meet a precondition of the sacking of Troy.) Philoctetes accedes to this, and the play concludes with Philoctetes calling upon his island's blessing for his voyage.

⁵⁹ For a discussion of this principle in the context of the play, see M W Blundell, *Helping Friends and Harming Enemies: A Study in Sophocles and Greek Ethics* (1981) Chapter 6.

⁶⁰ Ibid 1357.

⁶¹ Ibid 1395.

⁶² Ibid 1402.

⁶³ Ibid 1403.

⁶⁴ C Gill, 'Bow, Oracle, and Epiphany in Sophocles' *Philoctetes*' (1980) 27 *Greece and Rome* 137, 142.

⁶⁵ *Philoctetes* 1425-26.

⁶⁶ Ibid 1433-35.

White's reading of the play includes talk about 'ends-means rationality'. To begin with, 'one thing ends-means rationality cannot do is choose its ends.'⁶⁷ Such rationality takes ends as given – as with the standard version of 'thinking like an economist'. In this regard, he fittingly directs his analogical imagination toward economics:

Compare the most systematic modern version of this kind of thought, market economics, in which ends are explicitly taken as external to the system: preferences are whatever any person happens to prefer, and all preferences are equal until given different values through the prices paid or obtained for them. Because Odysseus cannot think about the proper choice of ends, his whole being is spent in the service of ends that he cannot examine. . . . As for the choice of means, Odysseus' attention to probability and improbability, cost and benefit, locates the authority for that choice outside the self, in the world, for the only question is what will work best. Such a mind cannot constitute a self.⁶⁸

The kind of rationality that White respects is one that takes introspection and 'self'-criticism seriously. We can be sure that Neoptolemus learned a great deal from his decision to accept Odysseus' call to 'give me yourself . . . [f]or one brief shameless portion of a day . . .'. A rationality without any integrity and commitment to certain values and principles arguably is a form of irrationality. The word 'irrationality' fits Odysseus, for whom 'the self has no continuity but is a series of discrete and unconnected actions and moments of consciousness, a set of fragments. This means that rational thought about, and action in, the social and cultural realm is impossible.'⁶⁹

For the economist who is preoccupied with theoretical models that expunge uncertainty, Sophocles' play will be of no value other than 'entertainment'. White, however, suggests that the play has much to teach:

[T]he play is at heart about the conditions under which ethical and practical thought take place, about their ontology and epistemology if you will. Here its major point is that the only circumstances under which ends-means rationality might be rational never exist, for our thought must always take place on conditions of uncertainty that render that kind of

⁶⁷ Ibid 21.

⁶⁸ Ibid.

⁶⁹ Ibid 21. Line reference omitted.

‘rationality’ worse than useless. These conditions require us to think in other, more difficult, ways and to attend first and last to questions of character and community. The only rational ‘ends’ – the only ends we can confidently use as guides to conduct – are conceptions of ourselves and of our relations with others, not materially describable states of affairs.⁷⁰

For those inclined toward judging actions according to the value of their consequences (‘consequentialism’), we will do well to extend the word ‘consequences’ to include the kinds of characters and communities we are making in our actions. We can be sure that this inclusion will not facilitate determinate solutions, but we can hope it will help create meaningful social realities.

For the economist who is preoccupied with models that begin with the isolated and independent individual (Defoe’s Robinson Crusoe is the conventional model), Sophocles’ play can be read as calling for another beginning. Generalizing from the play, White says:

Our practical and moral lives are radically communal – unless perhaps we live alone on an island – and this means that our thought about what we want and who we are must reflect the freedom and power of others, without whose free cooperation we can have nothing of value, be nothing of value. This in turn means that hardheaded practical thought and sound ethical thought alike require us to recognize the existence of others and our dependence upon them.⁷¹

We do not need to try and refute claims by economists and others that an important matter is the individual. We simply need to claim that the individual emerges in and is constrained by a collectivity. We cannot escape the need to work out and rework out the terms by which pervasive interdependencies between individuals are managed. A vital question that each individual faces is this: How can we enhance our relationships with each other?

Sophocles’ play offers some valuable food-for-thought about the way we talk about our relationships with one another, in the hope of better relationships. How are we to judge our talk? White addresses that question in his talk about the play:

⁷⁰ Ibid 23.

⁷¹ Ibid 25.

[I]n its demonstration of what it means to treat another as an 'end' or as a 'means' it establishes standards by which we can judge particular conduct and speech, particular relations and communities. This literary demonstration in the text, as read or performed, has a clarity and force—a persuasiveness—that theoretical argument could never have, for it works by constituting the audience in a new way. The play addresses the whole reader, not just one capacity or faculty, and evokes an integrated response. In which pleasure, excitement, enjoyment, commitment, as well as learning, are engaged. It integrates the experience and the self, locating them in the conditions of uncertainty in which we must actually live. The audience is newly constituted by the play in a new position, from which the only imaginable attitude to take towards persuasion and community is that of recognition and integration, the only imaginable rhetoric is sincere and authentic It achieves this by creating a community with the audience that directly parallels the community created between Neoptolemus and Philoctetes: as we hear Philoctetes speak, we respond to him as Neoptolemus does; we respond to Neoptolemus as Philoctetes does; and so on.⁷²

White here makes a fundamental distinction between two ways of using language, namely 'literary' and 'theoretical'. The first works on the basis that a text offers an 'experience' that is not reducible to propositional form ('by *rationality* I mean . . .'; by ends I mean . . .'); the second on the basis that a text has a thesis that can be cast in propositional form in the pursuit of compelling agreement through a 'logical' argument. White gives privileged status to the first, and he invites his reader to join him after judging them for herself. He believes that the problem with 'theoretical' talk is that it is grounded on a false assumption about language, namely that words can carry fixed meanings. Bentham made such an assumption, and he seems to be profoundly wrong. We can judge this to be the case not through a 'logical' argument but from 'experience'.

⁷² Ibid.

Rhetoric

The word 'rhetoric' has had and continues to have an extraordinary life. Since at least the time of Socrates it has been part of a conversation about the way we humans talk with one another. (The word 'rhetoric' goes back to a Greek verb that means 'to speak'.) A distinctive turn in the conversation began in the 1950s. Let us tune in to this turn and place White in it.

* * *

In the bibliographical notes at the end of *When Words Lose Their Meaning* White tells his reader that his 'interest in constitutive discourse has been directly and indirectly influenced by Kenneth Burke'.¹ Burke is perhaps best known for his efforts to rehabilitate the word 'rhetoric'. His interest in doing so is suggested at the outset of *A Rhetoric of Motives* (1950):

[W]e seek to mark off the areas of rhetoric, by showing how a rhetorical motive is often present where it is not usually recognized, or thought to belong. In part, we would but rediscover rhetorical elements that had become obscured when rhetoric as a term fell into disuse, and other specialized disciplines such as esthetics, anthropology, psychoanalysis, and sociology came to the fore (so that esthetics sought to outlaw rhetoric, while the other sciences we have mentioned took over, each in its own terms, the rich rhetorical elements that esthetics would ban).²

For Burke, the increasing degrees of intellectual division of labour need not be sensed as fragmental if his job of rehabilitation was successful. More positively, the recovery of a sense of unity in the academy could be achieved if the ordinary meaning of the R-word could be transformed.

¹ *When Words Lose Their Meaning* 291.

² K Burke, *A Rhetoric of Motives* (1950) xiii.

'Rhetoric', he says, 'is concerned with the state of Babel after the Fall.'³ Making sense of this state requires a language, the making of which is an act of the imagination. For Burke, the rehabilitation of 'rhetoric' goes hand in hand with the rehabilitation of the word 'imagination'.⁴ The close association between the two can be readily connected with the law:

Bentham's great contribution to the study of persuasion were made almost in spite of himself. In trying to promote ways of discussion that could truly transcend the suggestiveness of imagery, he revealed how thoroughly imaginal our thinking is. Scrutinizing the most abstract of legalistic terms, asking himself just what it meant to plead and pass judgment in terms of 'legal fictions,' he proposed a methodic search for 'archetypes.' By 'archetypes he meant the images that underly the use of abstractions. . . . Bentham here discovered a kind of poetry concealed beneath legal jargon usually considered the very opposite of poetry. It was applied poetry, or rhetoric, since it was the use of poetic resources to affect judgments, decisions, hence attitudes and actions.'⁵

After reading Burke, titles of White's such as 'the rhetoric and poetics of the law' may not sound so strange. Bentham might have turned in his grave had he been buried.

Burke's 'rhetoric' can serve to make connections between people who might otherwise seem to have little or nothing in common. Immediately after his rhetorical analysis of Bentham, Burke turns to Marx and Marxists:

Whatever may be the claims of Marxism as a 'science,' its terminology is not a neutral 'preparation for action' but 'inducement to action.' In this sense, it is unsleepingly rhetorical, though much of its persuasiveness has derived from insistence that it is purely a science, with 'rhetoric' confined to the deliberate or unconscious deceptions of non-Marxist apologetics. Thus, we once saw a Marxist (he has since left the Communist Party) get soundly rebuked by his comrades for the suggestion that leftist critics collaborate in a study of 'Red Rhetoric.' Despite their constant efforts to find the slogans, catchwords, and formulas that will most effectively influence action in given situations, and their friendliness to 'propaganda' or 'social significance' in art, they would not allow talk of a 'Red Rhetoric.'

³ Ibid 23.

⁴ Ibid 78-83.

⁵ Ibid 90.

For them, 'Rhetoric' applied solely to the persuasiveness of capitalist, fascist, and other non-Marxist terminologies (or 'ideologies').⁶

Burke here sets himself up for talking about a fundamental equality. 'Marxists have a rhetoric, a persuasion',⁷ just like every human speaker, including himself. We are all rhetoricians, including you and I.

White's work can perhaps be best imagined as beginning from Burke's suggestion that we all reside in a rhetorical world. Consider, for example, what White says at the beginning of *Heracles' Bow*:

The reader may at the outset be puzzled by the analogies suggested by the titles to many of the essays. Law is like, they seem to say, a language, but it is also like drama and poetry and rhetoric and narrative. Each of these analogies, even if in some way attractive, seems in its own terms arguable, but taken together how can they possibly be true? Can these analogies be seriously meant?

I do indeed mean each of these analogies, but I also mean to say something about analogic thinking more generally. Part of my object is to establish a way of thinking by drawing analogies, by making metaphors—by talking about one thing in terms of another—and these essays can be taken in that spirit: not as proposing comparisons between law and other things, each of which is presented as uniquely true and better than any other such comparison, but as manifesting a bent of mind, a disposition and a method, that works by looking at law and one cultural and social activity among others. My emphasis is for the most part on the similarities rather than the differences, partly because many of the differences are self-evident, but also, and more centrally, because one of my aims is to get behind these activities to what they can be seen to share. The kind of analogy I draw is thus not a point-by-point comparison of features, but an attempt by looking at two things to make real and vivid the ground that they share, against which each is a somewhat different figure.

I have no certain name for this ground (or activity, or discipline) and my best definition of it naturally enough lies in my performances in these pages. I would like to call it the art of constituting character, community, and culture in language; if I were to give it a name it would be 'constitutive rhetoric' . . . or perhaps 'the poetics of community.' But these would be only names, and I would not want to be bound by all their implications, nor by what they

⁶ Ibid 101.

⁷ Ibid 101-02.

seem to omit, as a way of defining the arts of communal and cultural life with which I am concerned.⁸

After reading White's 'constitutive rhetoric', the commonly used 'thinking like ...' phrases – such as 'thinking like a lawyer', 'thinking like an economist' – may well lose their meaning. The ordinary 'reasoning by analogy in the law' may be closely analogous to 'thinking like' in economics and elsewhere. In drawing analogies we may come to sense a space without borders, a space that all human 'share' (*Analogy).

* * *

How did 'rhetoric' become so badly tainted? Walter Ong, in *Ramus, Method, and the Decay of Dialogue* (1958), provides a suggestive history on the devaluation of rhetoric. Here he gives a detailed account of Petrus Ramus' preoccupation with 'method' in relation to the pursuit of knowledge. In the 1540s, based on his belief that the traditional curriculum, especially the teaching of rhetoric, had become filled with redundancies, Ramus set about reorganizing the arts. In this reorganization, Ramus contributed to a shift from aural to visual figures of thought and speech for knowing the world. Ong tells us:

By 1555, Ramus offhand references to rhetoric show that he thinks of it in uncomplicated visualist terms as serving 'pour orner la parole.' Little wonder that Ramus' followers . . . will define rhetoric quite flatly as 'the art of expressing oneself ornately.' 'Praise' and 'honor,' and with them much of the reality of sound itself, are gone.⁹

Dominating the passage from the early discourse-knowledge to observation-knowledge stands the all-important figure of the teacher. He has grown to enormous stature in the universities Instead of carrying on a dialogue in the give-and-take Socratic form, the university don had largely reduced the oral component by converting it into a classroom monologue, which he produced not as the spirit moved him but on schedule at fixed places and hours. At the same time his interest both in logic and explicitness, in an 'object' (of knowledge) rather than in a 'subject' (of discourse), had driven him further still toward the

⁸ *Heracles' Bow* ix-x..

⁹ W J Ong, *Ramus, Method, and the Decay of Dialogue: From the Art of Discourse to the Art of Reason* (1958) 279 footnotes omitted.

visile pole with its typical ideals of 'clarity,' 'precision,' 'distinctness,' and 'explanation' itself – all best conceivable in terms of some analogy with vision and a spatial field.¹⁰

In this economy where everything having to do with speech tends to be in one way or another metamorphosed in terms of structure and vision, the rhetorical approach to life – the way of Isocrates and Cicero and Quintilian and Erasmus, and of the Old and New Testaments – is sealed off into a cul-de-sac. The attitude toward speech has changed. Speech is no longer a medium in which the human mind and sensibility lives. It is resented, rather, as an accretion to thought, hereupon imagined as ranging noiseless concepts or 'ideas' in a silent field of mental space. Here the perfect rhetoric would be to have no rhetoric at all.¹¹

In the post-Gutenberg age where Ramism flourished, the term 'content,' as applied to what is 'in' literary productions, acquires a status which it had never known before. In lieu of merely telling the truth, book would now in common estimation 'contain' truth, like boxes.¹²

There are difficulties, however, in the tendency to reduce other sensory knowledge to visual terms. An oscillograph of a sound gives everything about the sound – except the sound itself. This is the price of becoming more 'abstract,' or explanatory. The description of a word (*verbum*, or *vox*) as a sign (*signum*) suffers from the same disability insofar as the notion of sign is based on a visual analogy. A word is more than a sign of something, even of an intelligible something such as a concept. It is a cry, a voice, something which comes from the interior of a person, who as a *person* can never be 'explained,' and which somehow manifests this interior.¹³

[The process of reducing knowledge to visual terms] can ... generate a self-confident, *simpliste*, covertly brash approach to the most complex problems. The tonality is detectable in ... Thomas Hobbes, who was famous for his 'constant undaunted resolution of maintaining his own opinions.' Such resolution seems to be a property of mind satisfied that a diagram or its equivalent is adequate to any situation. One thinks of ... the mass of little men, human atoms, who go to make up the state in the famous frontispiece to Hobbes' *Leviathan*.¹⁴

¹⁰ Ibid 151.

¹¹ Ibid 291.

¹² Ibid 313.

¹³ Ibid 109-110.

¹⁴ Ibid 147-48.

From what Ong says here, it would seem no exaggeration to say that the life of the word 'rhetoric' has had a pivotal place in the evolution of Western civilization. Efforts to rehabilitate the word are of no small significance. We can expect the promotion of 'dialogue in the give-and-take Socratic form' and the decline of talk about 'noiseless concepts' (*Concepts).

Like Burke's *Rhetoric*, Ong's *Ramus* challenged the predominant image of rhetoric as the dishonourable art of persuasion, with which, for example, the weaker case can be made to appear the stronger. Others joined him in resisting.¹⁵ Wayne Booth, a leading resister from the later 1950s until his death in 2005, offered these remarks in 1965:

All of the critics who have taken part in the revival of rhetorical studies that began in the mid-fifties have defined the term in ways that would require us to speak of 'bad rhetoric' when we refer to the perversions I have just described. The definition of good rhetoric, or of rhetoric in general, good *and* bad, varies from critic to critic. But beneath the differences there is a general agreement that to engage with one's fellow men in acts of mutual persuasion, that is, of mutual inquiry, is potentially a noble thing.¹⁶

'What sort of rhetoric is Booth engaged in here?', his imagined audience may be asking.

For Booth, as expressed in *Modern Dogma and the Rhetoric of Assent* (1974), 'man is essentially a rhetorical animal, in the sense that his nature is discovered and lived only in symbolic process'.¹⁷ Booth's *Homo rhetoricus* is not an isolated inquirer, not the least because a 'self' is 'a field of selves'.¹⁸ The 'I' is not singular but plural: 'when thinking privately, "I" can never escape the other selves which I have taken in to make "myself," and my thought will thus always be a dialogue'.¹⁹ Booth's image challenges other images of the nature of humans, including that proposed by René Descartes:

¹⁵ Notable in legal circles is C Perelman and L Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (1958; 1969); C Perelman, *The Idea of Justice and the Problem of Argument* (1963) 134; C Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning* (1980) 120. Other than White, second-phase contributions to the rehabilitation of rhetoric in law include B McLeod, 'Rules and Rhetoric' (1985) 23 *Osgoode Hall Law Journal* 303; P Goodrich, 'Rhetoric as Jurisprudence' (1984) 4 *Oxford Journal of Legal Studies* 88; S Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) 474.

¹⁶ W C Booth, 'The Revival of Rhetoric' (1965) 80 *PMLA* 8, 9-10.

¹⁷ W C Booth, *Modern Dogma and the Rhetoric of Assent* (1974) 126.

¹⁸ *Ibid.*

¹⁹ *Ibid* 134.

Descartes thought that he found an indubitable self when he set out to practice systematic doubt on everything that could be doubted. Peeling off the layers, he found a core of awareness of the process of doubt itself, the inescapable consciousness of the mental datum 'doubt,' even in the moment of most extreme skepticism. But his famous formula for his conclusion that he therefore existed – *cogito, ergo sum; je pense, donc je suis* – renders dramatically the fact that the whole project had been radically social from the beginning. The doubter . . . did his doubting in a language that he had not invented. The 'I' derived from the experiment already existed in a matrix of other persons before the experiment began; the questions asked and the data discovered even in the most extreme moment were tainted, as it were, with community.²⁰

Acceptance of the image of humans as a 'rhetorical animal' has significant implications: when we begin not with the *cogito* of Descartes but with 'our knowledge that we are creatures made in symbolic exchange, created in the process of sharing intentions, values, meanings . . . , then the whole world shifts: even usage of words like *I, my, mine, self*, must be reconsidered, because the borderlines between the self and the other have either disappeared or shifted sharply.'²¹

* * *

Booth's image of *Homo rhetoricus* is a challenge to the dominant image of *Homo economicus*. Arjo Klammer, in a contribution to the volume *The Rhetoric of the Human Sciences* (1987), provides some suggestive materials for integrating *Homo rhetoricus* and *Homo economicus*. He claims that 'those who desire to reflect on economic discourse might . . . turn for illumination to the works of . . . Kenneth Burke, Wayne Booth, and the like.'²² In doing so, he takes not only 'the people' seriously, but also metaphor and the question of why economists disagree:

²⁰ Ibid.

²¹ Ibid. Stanley Cavell has expressed curiosity about the status of the *cogito*: 'If I am supposed to exist only if I acknowledge that I do, claim my existence, who was I before I acknowledged it, and before whom is it that I claim it, since every other's existence must be under the same necessity of acknowledgement that mine is under?' S Cavell, 'Naughty Orators: Negation of Voice in *Gaslight*', in S Budick and W Iser (ed), *Languages of the Unsayable* (1987) 340, 347.

²² A Klammer, 'As If Economists and Their Subjects Were Rational' in J S Nelson, A Mefill, & D N McCloskey, *The Rhetoric of the Human Sciences: Language and Argument in Scholarship and Public Affairs* (1987) 163, 181.

'Where are the people in the economic models?' is a question . . . often heard outside the world of neo-classical economics. . . . Although each protester has individual reasons for rejecting 'Rational Economic Man,' a common motivation is that our reason . . . feels less at ease in a world where it no longer finds, as in a mirror, its own image. We cannot recognize ourselves in the neo-classical version of human beings.

The rejection can be better understood when we consider the metaphorical aspect of the statement that 'economic agents are rational in the sense that they optimize their objective functions under a set of relevant constraints.' According to Aristotle, 'metaphor consists in giving a thing a name that belongs to something else; the transference being either from genus to species, or from species to species, or on the grounds of analogy.' But using a metaphor is not a simple matter of name switching. Colin Turbane points out that 'the use of metaphor involves the pretense that something is the case when it is not. That pretense, however, can be ignored by the user or not understood by the audience; this appears to be the case with the metaphor of the Rational Economic Man. Perhaps many neo-classical economists take it literally; certainly their critics assume they do. Turbayne would say that they are 'being used by the metaphor,' taking it too far in their attempt to validate it.

But the metaphor is not entirely 'dead,' as Turbayne would say. Partly in reaction to the critics, some neo-classical economists are invoking Milton Friedman's phrase—'as-if assumptions'—to defend it. They are saying that their models present agents *as if* the agents were robots that optimize objective functions under certain constraints. The 'as if' idiom is the idiom of the analogy. Milton Friedman and many other economists use it to dispel the criticisms, but they misunderstand the role of the analogy or metaphor.

Max Black's interaction view suggests that this unusual combination of human beings and robots produces new insights and new meaning for both components. Economists see the computer program that guide the robot's behavior as a model for representing human behavior. We have discussed the analytical value of the analogy, but Black points out that the analogy . . . also works as a filter: the negative correspondence between human beings and robots is suppressed. The analogy, he argues '*organizes* our view of man.' A good analogy or metaphor, therefore, produces an 'attitude shift,' and it is the attitude shift required by the robot analogy that its critics resist. To them, the meaning of the analogy is unappealing because the negative correspondence between human beings and robots is simply too important. Let us, in light of these perspectives, review some of their criticisms.

The so-called Austrian economists agree in many ways with neo-classical economists: they place the individual in the center of the universe, believe in individual rationality, and focus on exchange relationships. But they dislike the mechanistic metaphor. It negates, they argue, the creativity of human beings, and the uncertainty under which decisions are made.

For similar reasons, business people are generally repelled by the way economists talk about their behavior. They too have in their network of beliefs the romantic image of the heroic individual as depicted in the American Dream.

Incidentally, the Austrians' criticism brings out the irony of the use of the mechanistic metaphor in neo-classical discourse. The romantic belief in the freedom of choice, and thus the free individual, coincides with the positing of a rather uninteresting if not tragic human being who is predictable and acts like a programmed robot.

Those who ask, 'Where are the people?' on the other hand, may have difficulties with the metaphorical human beings in neo-classical discourse as well as the network that surrounds it. To them, the filter of the metaphor removes the psychological *and* sociological complexity of each individual, projecting a one-dimensional, solipsistic, characterless 'unity' with no social bonds. . . . These critics probably like the saying of Rabbi Hillel: 'If I am not for myself, who will be for me? If I am only for myself, what am I?'

Radical critics find in the notion of rationality an attempt to justify the capitalist system that they seek to change. . . . The filter works, from the radical perspective, in favor of those who seek control through technology and bureaucratic institutions. Moreover, it suppresses the class structure of capitalist society and rules out the understanding of conflictual relationships.²³

That passage was the source of an 'aha' experience for me, an experience in which I came to an understanding of how my thinking about thinking had been misdirected.²⁴ The experience, which is one that a dynamic *Homo economicus* should be able to have, occurred when I ('which I?', Rabbi Hillel might ask) first read it as an economics student who was trying to make sense of my doubts about the meaningfulness of the 'neo-classical' economics that was being taught. Several of my teachers had used Milton Friedman's 'as if' line in response to my questions (and similar ones from some fellow students) about the 'unrealistic' quality of the 'rationality' assumption. I had sensed that something was not quite right about their response, but I couldn't express well this 'something'. Klammer hit the nail on the head for me. In short, by my reading of Klammer, in working with 'the metaphor of the Rational Economic Man', my teachers were making problematic assumptions about 'the role of the metaphor'.

²³ Ibid 178-80 (quotations marks and footnotes omitted).

²⁴ For a fuller discussion of the 'aha' experience, see R E Allinson, *Chuang-Tzu for Spiritual Transformation: An Analysis of the Inner Chapters* (1992) 8-9.

Klamer, who seems to present himself as someone resembling an anthropologist in the midst of trying to make sense of a strange people, goes on to identify some social pressures work within the group:

Neo-classical economists have the advantage of 'cultural hegemony' in the economic tribe and consequently can exert considerable social and institutional pressure to bring about in their students the attitude shift required for acceptance of neo-classical metaphors. . . . Neo-classical economists protect their hegemony by placing themselves on the top floor of the social science building: they claim scientific status for their theories, display confidence by pointing out their past successes and promising developments of their analogies, and ignore alternative discussions. Criticisms of their arguments have as much impact as rain on a duck's back.²⁵

Persuadability may not be a virtue once one has been persuaded to become a member of the powerful sub-tribe. Concerning inter-tribe dynamics, as a third-year student I couldn't make sense of why my 'Austrian' teacher seemed hostile toward some of his fellow 'neo-classical' teachers. Klamer provides a possible explanation: my 'Austrian' teacher had sought to emphasize the creative economic actor, but his arguments for doing so had had 'as much impact as rain on a duck's back'. He may well have been irritated with the 'irrationality' of the 'cultural hegemony' in the 'economic tribe'.

Klamer's rhetorical turn has much to suggest about the importance of being persuadable. Klamer seeks to persuade his reader that attention to rhetoric can help us make sense of different ways of imagining economics:

An examination of the rhetorical dimensions of economic discourse illuminates not only the attractions of the neo-classical way of speaking, but also the reasons for the discomfort, if not outright frustration, with it. The economic metaphors produce a perspective on our world that can be unacceptable to economic actors. Consequently, students are not being silly when they doubt the meaningfulness of neo-classical economics. Business people and workers are unfairly ruled out of order when they say that they cannot recognize themselves in the economic models of their behavior. Other social scientists have reasons to resist economic imperialism and to cherish their sociological and historical methods, even though these methods may violate the rules of mathematical language games. The point is to turn

²⁵ Klamer, *op cit*, 181.

discussion on economic subjects into interesting exchanges: conversations that are meaningful. Talk based on the pretense that everyone is rational may simply not be that interesting.²⁶

Does that not sound 'rational'? Klammer's rhetorical turn opens up a line of inquiry that invites his reader to give new life to the word 'rational', in and out of economics (*Rationality). Talk based on the pretense that everyone is 'rational' may simply be 'silly' and irrational when the task, as in the law, is to create a workable mutuality among people who do think and talk differently. A conversational (polyphonic) performance, such as that offered by Klammer, may be the best model for a rationality worthy of the name (*Voice).

* * *

In *The Legal Imagination*, for the purpose of providing a resource for thought and expression about the political and ethical dimension of speaking, White reproduces fragments from the opening chapters of Aristotle's *Rhetoric*. Aristotle identified three ways of persuading by speech: through the character (*ethos*) of the speaker; through the emotions (*pathos*) raised in the audience; and through the force of reasoning (*logos*). White uses Aristotle's terms for 'framing a series of questions', including these:

To start with 'ethos' (character), . . . [a]ssuming that the appearance of personal goodness, kindheartedness, and decency would be of value to one's courtroom career, how is the eager student or young lawyer to acquire it? To fail in the attempt is to occasion disaster – we have all shuddered at a lawyer's expression of sincere concern for the opposing witness – yet what does one do instead? Act natural?²⁷

'Pathos,' the capacity for arousing emotions in the audience, is Aristotle's second source of power in argument. Obviously most valuable for a lawyer, one might say, but how is it to be achieved? As with 'ethos,' the danger of failure is enormous, because no one likes to recognize that a speaker is trying to work on his emotions, and if he has that suspicion he may disregard everything you say.²⁸

²⁶ Ibid 182.

²⁷ *The Legal Imagination* 815.

²⁸ Ibid 818.

Aristotle's third source of persuasive power is 'logos,' a term that will no doubt prove as difficult to deal with as 'rationality' has been. As I have already suggested, whatever might be meant by such a term of description and approval, it cannot be the demonstration of the logically necessary: despite the fact that the law is often articulated in rules whose form reminds us of Euclidean postulates and axioms, the process of their use is not one of elucidating logically necessary implications, but of choosing among several logically possible alternatives. The enterprise is not one of compulsion but persuasion. 'Logos' cannot refer to the strictest standards of logical validity, or rhetoric would be a form of mathematics. It must point to a complex and nonsystematic excellence, similar to what we mean when we speak of a 'good poem' or a 'good conversation' or a 'good judicial opinion.' . . . How can this art be spoken of?²⁹

White would consider modern 'rational choice' theory, with its simple opposition of rational versus irrational, to be of very limited value for lawyers. Against the current of such theory, he suggests that 'pathos' and 'ethos' should not be categorized as 'irrational' but be an integral part of the meaning of 'rationality'. White follows Aristotle in articulating a sense of rhetoric that unites argument and character.

White's position is more fully expressed in *When Words Lose Their Meaning*. The title of his book draws from Thucydides' *History of the Peloponnesian War*, in which there is an account of a social disintegration that is associated with a linguistic deterioration (*Rationality). For White, Thucydides' account is an entry point to attending to the ways in which 'language' and 'character' and 'community' are bound together in a manner that negates any sense of their separateness. (White's subtitle is instructive: *Constitutions and Reconstitutions of Language, Character, and Community*.) These connections link with his approach to 'rhetoric', a link about which he is explicit:

I will both proceed from and seek to validate the premise implicit in the title of the book, that language is not stable but changing and that it is perpetually remade by its speakers, who are themselves remade, both as individuals and communities, in what they say. The basic question asked of each text is how it performs as a response to this situation. We shall be thus be interested less in what differentiates the genres represented here—poetry and philosophy and history and moral essays and fiction and politics and law—than in what unites them, in the tree of which they are several branches. For they are all species of the

²⁹ Ibid 819-21.

more general activity that is our true subject: the double activity of claiming meaning for experience and of establishing relations with others in language. Each of the texts we shall read proceeds by working upon a world it defines and leading its reader to a position within it. To put it in a single word, I would say that our subject is rhetoric, if by that is meant the study of the ways in which character and community—and motive, value, reason, social structure, everything, in short, that makes a culture—are defined and made real in performances of language.³⁰

The metaphor of the tree seems apt to me for White's hope of giving new life to 'rhetoric'. For him, 'rhetoric' is a word of integration; it unites 'motive, value, reason, social structure, everything, in short, that makes a culture'.

Heracles' Bow is also concerned with the 'rhetorical' process by which self and community are formed and reformed. Unlike *When Words Lose Their Meaning*, *Heracles' Bow* is centered on one 'branch' of the rhetoric 'tree', namely law. White explicitly resists the image of law as 'a body of more or less determinate rules', for law becomes 'objectified and made a structure'.³¹ He would have us imagine an 'activity':

I want to start by thinking of law not as an objective reality in an imagined social world . . . but from the point of view of those who actually engage in its processes, as something we do and something we teach. This is a way of looking at law as an activity, and specifically as a rhetorical activity.

In particular I want to direct attention to three aspects of the lawyer's work. The first is the fact that, like any rhetorician, the lawyer must always start by speaking the language of his or her audience, whatever it may be.

This is just a version of the general truth that to persuade anyone you must in the first instance speak a language he or she regards as valid and intelligible. If you are a lawyer this means that you must speak either the technical language of the law—the rules, cases, statutes, maxims, and so forth that constitute the domain of your professional talk—or, if you are speaking to jurors or clients or the public at large, some version of the ordinary English of your time and place and culture. Law is in this sense always culture-specific. It always starts with an external, empirically discoverable set of cultural resources into which it is an intervention.

³⁰ *When Words Lose Their Meaning* xi.

This suggests that one (somewhat circular) definition of the law might be as the particular set of resources made available by a culture for speech and argument on those occasions, and by those speakers, we think of as legal. These resources include rules, statutes, and judicial opinions, of course, but much more as well: maxims, general understandings, conventional wisdom, and all the other resources, technical and nontechnical, that a lawyer might use in defining his or her position and urging another to accept it. To define 'the law' in this way, as a set of resources for thought and argument, is an application of Aristotle's traditional definition of rhetoric, for the law in this sense is one of those 'means of persuasion' which he said it is the art of rhetoric to discover.

In the law (and I believe elsewhere as well) these means of persuasion can be described with some degree of accuracy and completeness, so that most lawyers would agree that such-and-such a case or statute or principle is relevant, and another is not. But the agreement is always imperfect: one lawyer will see an analogy that another will deny, for example. And when attention shifts to the value or weight that different parts of the material should have, disagreement becomes widespread and deep. Ultimately the identity, the meaning, and the authority of the material are always arguable, always uncertain. There is a sense in which the materials can be regarded in the first instance as objective, external to the self; but they are always remade in argument. Their discovery is an empirical process; their reformulation and use an inventive or creative one.

This suggests that the lawyer's work has a second essential element, the creative process to which I have just alluded. For in speaking the language of the law the lawyer must always be ready to try to change it: to add or to drop a distinction, to admit a new voice, to claim a new source of authority, and so on. One's performance is in this sense always argumentative, not only about the result one seeks to obtain but also about the version of the legal discourse that one uses—that one creates—in one's speech and writing. That is, the lawyer is always saying not only, 'Here is how the case should be decided,' but also 'Here—in this language—is the way this and similar cases should be talked about. The language I am speaking is the proper language of justice in our culture.' The legal speaker always acts upon the language that he or she uses; in this sense legal rhetoric is always argumentatively constitutive of the language it employs.

The third aspect of legal rhetoric is what might be called its ethical or communal character, or its socially constitutive nature. Every time one speaks as a lawyer, one establishes for the moment a character—an ethical identity, or what the Greeks call an *ethos*—for oneself, for one's audience, and for those one talks about, and proposes a

³¹ *Heracles' Bow* 29.

relationship among them. The lawyer's speech is thus always implicitly argumentative not only about the result—how should the case be decided?—and the language—in what terms should it be defined and talked about?—but about the rhetorical community of which one is at that moment a part. One is always establishing in performance a response to the question 'What kind of community should we who are talking the language of the law establish with each other, with our clients, and with the rest of the world? What kind of conversation should the law constitute, should constitute the law?

Each of the three aspects of the lawyer's rhetorical life can be analyzed and criticized: the discourse he is given by his culture to speak; his argumentative reconstitution of it; and his implicitly argumentative constitution of a rhetorical community in his text. The study of this process—of constitutive rhetoric—is the study of the ways we constitute ourselves as individuals, as communities, and as cultures, whenever we speak.³²

We can be sure that the Nelson Mandelas and the Bram Fischers of the lawyering world have little or nothing to learn from that passage, which should be a 'must read' for anyone who really wants to know what lawyers *do* and what the transformative possibilities of law are. The passage provided economist Dawson with the beginnings of a 'resource' (to use White's word), for thinking about the *activity* of being an economist, especially about the way economists communicate with other economists and with outsiders. The use of the word 'resource' in this context seems awkward. 'Economics', to draw from an introductory textbook, 'studies how individuals and institutions within a society make choices, and how these choices determine society's use of its resources.'³³ That narrow definition could do with some dramatic modification when one takes language, including the language of 'the law', seriously as a 'resource'. What would become of economics if economists accepted that language is a 'resource' that each one of us transforms as we use it? Might a transformative turn become associated with the death of economic imperialism to the extent that economists would appreciate the legal hearing in a new way, as a place for civilly negotiating the direction of linguistic transformations? Commons' books might no longer gather dust on the library shelves (*Activity).

Let me continue to make connections between the two 'fields'. In economics the means of persuasion can also be described with some degree of accuracy and

³² Ibid 33-35.

completeness, so that most economists, in the context of a dispute about some policy, would agree that such-and-such a theory is relevant, and another is not. But the agreement is always imperfect This suggests that the economist's work has a creative element to it. For in speaking the language of economics the economist must always be ready to try to change it: to add or to drop a distinction, to admit a new voice, or to claim a new source of authority

That attempted connection, of course, is all nonsense. Or so we hear an imagined economist saying so. Unlike law, economics is a science, or at least can and should be. The Marxists and other radicals give the science a bad image in regard to disagreement. There is relatively little disagreement among scientific economists on policy matters. Unlike lawyers, these economists are not rhetoricians.

That attempted disconnection, perhaps needless to say, is all nonsense. In *Heracles' Bow*, White has this to say on the relation between rhetoric and science:

The tendency to think of rhetoric as failed science is especially powerful in the present age, in which such determined attempts have been made to elevate, or reduce, virtually every disciple to the status of true science. The idea of science as perfect knowledge has of course been recently subjected to considerable criticism, both internal and external. It is now a commonplace that scientific creativity is imaginative, almost poetic; that scientific knowledge is only presumptive, not certain; and that science is a culture that transforms itself by principles that are not themselves scientific. Yet the effort to make the language and conventions of science the ruling model of our age, our popular religion, lives on in the language and expectations of others, especially of those who are in fact not true scientists. Much of economic discourse, for example, is deformed by the false claims of the discipline to the status of perfect science, which leads to the embarrassing situation in which economic speakers representing different political attitudes couch their differences in scientific terms, each claiming that the other is no true economist. This not only confuses the observer but renders the field of economics less intelligible than it should be, even to its participants, and it reduces important political differences, which might be the topic of real conversation, to the status of primary assumptions.³⁴

³³ J E Stiglitz and C E Walsh, *Economics* (1993; 2002) 10.

³⁴ *Heracles' Bow* 32.

This passage provided economics student Dawson with food-for-thought on why economists disagree. He witnessed a hostile interchange in which one economist asserted to another that he was 'not a real economist'. The word 'real' was associated with the use of the S-word, which served as a conversation-stopper. White's essay suggests to me that what is to be imagined as 'economic' could well integrate a 'political' element. With some 'real conversation' going on, the conversations that go by the name 'economics' might once more become 'political economy'.

The passages quoted above from *Heracles' Bow* are taken from a chapter that is reproduced in a volume *The Rhetoric of the Human Sciences* (1987), a chapter that sits alongside Klammer's contribution, which is discussed above.³⁵ In a review of the volume, Peter Munz had this to say:

One of the remarkable features of the second half of our century is the revival of an interest in rhetoric, always alleged to be the art of persuasion not by truth or reason or any other authority but by a number of irrational, psychologically effective, devices, which an earlier more rational age might have dismissed as irrelevant tricks.³⁶

Rhetoric is the art of persuasion. . . . Any persuasion is rhetorical as long as it does not rely on physical coercion. But there is one great exception where persuasion takes place without rhetoric. People can be persuaded of the truth of a statement when there is reasonable or rational grounds for the statement. In that case no further persuasion over and above the evidence of rationality of the argument itself is required. This exception is indicative of the heart of the matter. We believe we rely on rhetoric when there is no or little evidence for a statement and when there is no or little logical argument to support it. The heart of the matter is that when a statement can be shown to be true, no rhetoric is required to persuade people to give their assent. When it cannot be shown to be true and even when it is believed to be false, nevertheless people can be persuaded to give their assent by the employment of rhetoric.³⁷

³⁵ J B White, 'Rhetoric and Law: The Arts of Cultural and Communal Life', in J J Nelson, A Megill, & D N McCloskey (eds), *The Rhetoric of the Human Sciences: Language and Argument in Scholarship and Public Affairs* (1987) 298, 301-2.

³⁶ P Munz, 'The Rhetoric of Rhetoric' (1990) 51 *Journal of the History of Ideas* 121, 121.

³⁷ Ibid 121-22.

Munz defines 'rhetoric' in part by opposing it to 'truth' and 'reason' and 'rationality' and 'logical' and by associating it with 'tricks'. He failed take up the invitation by White and others to resist the oppositions. Munz has ears, but he does not hear, to echo Psalm 115 verse 6. What questions might we ask Munz? Concerning being 'persuaded of the truth of a statement, what is to count 'reasonable or rational grounds'? The process by which this is determined involves the 'art' of argument. And so too, as a lawyer well knows, with the process of determining 'when there is no or little evidence for a statement'. And so too, as a philosopher well knows, with the process of determining what counts as 'logical argument'. Is my whole 'argument' here (where?) worthy of being called 'logical' and 'reasonable or rational'?

A similar tune to that sung by Munz can be heard in Richard Posner's *Law and Literature* (1988). Here he calls Justice Holmes' dissenting opinion in *Lochner v New York* 'a rhetorical masterpiece'.³⁸ By those words we may take it that he meant approximately this: very successful in gaining assent irrespective of whether the assent is justified. Concerning the 'assent', Posner stated that Holmes' dissenting opinion 'not only contributed to the shift in opinion that culminated many years later in the repudiation of "Lochnerism" but also became the symbol of opposition to the judicial philosophy reflected in the majority opinion.'³⁹ And concerning the 'justified', Posner went on to suggest that the persuasive success of Holmes' dissenting opinion was far from it in various respects:

Would the dissent in *Lochner* have received a high grade in a law school examination in 1905? I think not. It is not logically organized, does not join issue sharply with the majority, is not scrupulous in its treatment of the majority opinion or of precedent, is not thoroughly researched, does not exploit the factual record, and is highly unfair to poor old Herbert Spencer, of whom most people nowadays know no more than what Holmes told them in the *Lochner* dissent.⁴⁰

Would Posner's criticism here of the dissent in *Lochner* have received a high grade in a rhetorical/composition studies examination in 1988? How is it to be judged? Is

³⁸ R A Posner, *Law and Literature: A Misunderstood Relation* (1988) 285.

³⁹ Ibid 284.

⁴⁰ Ibid 285 (footnote omitted).

'logically organized' a criterion? If so, how defined? Is it 'highly unfair' to poor old Holmes, who is not around to defend himself? Is it just?

Posner argues that the power of Holmes' dissent was derived in part from 'rhetorical tricks'.⁴¹ One of these 'tricks' included a tone of 'assurance' that 'puts the reader on the defensive; dare he question a statement made with such a conviction so confident and serene?'⁴² (How does Posner treat his reader?) Another trick included a 'good . . . metaphor' ('metaphors, because of their concreteness, vividness, and, when they are good, unexpectedness, are more memorable than their literal equivalents'), and in this regard Posner states that 'Holmes has made Spencer's book the metaphor . . . for the philosophy of laissez-faire',⁴³ along with a claim that '*Lochner* shows that metaphor can be a powerful tool of legal persuasion.'⁴⁴ What might Posner say about his own rhetorical tricks (*Metaphor)?

For the purpose of extending Posner criticism, let us go directly to the case. *Lochner* concerned the Bakeshop Act 1895, which limited the hours of labour for bakers to ten hours per day or sixty per week. At the turn of the century it was not uncommon for bakers to work more than one hundred hours per week. In cities, bakeries were usually located in the cellar of a tenement house, in which the environment was inhospitable, to say the least. As documented in materials quoted by the dissenting Justice Harlan (with whom Justices White and Day concurred),

The constant inhaling of flour dust causes inflammation of the lungs and the bronchial tubes. The eyes also suffer through this dust, which is responsible for the many cases of running eyes among the bakers. The long hours of toil to which all bakers are subjected produce rheumatism, cramps, and swollen legs. . . . The average age of a baker is below that of other workmen; they seldom live over their fiftieth year, most of them dying between the ages of forty and fifty.⁴⁵

Proponents of shorter hours statutes had for decades been arguing that such legislation was needed to assure fairness for workers who were in no position to bargain for 'reasonable' conditions of employment. Opponents of such legislation

⁴¹ Ibid 288.

⁴² Ibid 283.

⁴³ Ibid 284.

⁴⁴ Ibid 295.

based their arguments on theories of social Darwinism and laissez-faire economics. The New York legislature acceded to petitions to have the working conditions of bakers improved, passing the Bakeshop Act. One hundred and nineteen elected representatives had voted in favour of the workday ceiling. No one voted against it.

One could be fairly confident at the time that the courts would uphold the statute as constitutional. In 1896, the Utah passed a health-related statute limiting the hours of labour in underground mines to eight per day. In 1897, the statute came before the Supreme Court of the United States in *Holden v Hardy*.⁴⁶ The sheriff, Hardy, had arrested Holden, an employer, after employing someone to work as an underground miner for ten hours per day. Holden's attorney argued that insofar as the worker had 'voluntarily' engaged his services the statute violated his right of liberty to make contracts protected by the Fourteenth Amendment. The Court, in a 6-2 decision, sustained the statute as a legitimate exercise of the police power. Company employers, had acquired relative strength in bargaining power vis-à-vis employees, enabling them to induce people to work longer hours through the fear of poverty:

The legislature has . . . recognized the fact which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgement, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority. . . . The fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself.⁴⁷

⁴⁵ *Lochner v New York* 198 US 45 (1905) 70-71.

⁴⁶ *Holden v Hardy* 169 US 366 (1898).

⁴⁷ *Ibid* 391-3 and 397.

To translate in a language of jurisprudence,⁴⁸ in sustaining the statute fixing maximum hours of work in mines, the Supreme Court held that the employer, Holden had *no right* to require his employees to work more than eight hours per day. As such, the employees had *no duty* to work more than eight hours per day if Holden commanded. That is to say, the employees were granted the *liberty* to refuse to work more than eight hours per day without fear of discharge. This reduced their *exposure*. Had the Court deemed the statute in question to be unconstitutional, the employees would have been exposed to the liberty of Holden to discharge them if they refused to work more than eight hours per day.

Justice Peckham, who offered a silent dissent in *Holden*, wrote the majority opinion invalidating the Bakeshop Act. 'The statute, he insisted, necessarily interferes with the right of contract between the employer and the employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment'.⁴⁹ Here Peckham fails to distinguish between 'right' and 'liberty.' And in doing so fails to address the relative pattern of liberty and exposure. On the matter of health, Peckham wrote:

There is nothing in *Holden v. Hardy* which covers the case now before us. . . . [W]e think there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract . . . The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best.⁵⁰

This passage is written in what Holmes referred to as 'the language of logic',⁵¹ cast as it is in terms of affirmation of liberty/rights, thereby obscuring the putative fact that by the decision itself liberty/rights were thereby *granted*. In concealing the choice, the value judgement made by the majority of the Court as to the relative worth of the

⁴⁸ For a discussion of this language and its application to the *Holden* case, see R Dawson, 'Sovereignty and Withholding in John Commons's Political Economy' in W J Samuels (ed), *The Founding of Institutional Economics: The Leisure Class and Sovereignty* (1998).

⁴⁹ *Lochner* 53.

⁵⁰ *Ibid* 55 and 61.

⁵¹ See Dawson, *op cit*, 47 and 72.

employer and employee is also hidden. Holmes' dissent draws attention to the selective perception of the Court:

It is settled by various decisions of this Court that State constitutions and State laws may regulate life in many ways which we as legislators might think as injudicious or, if you like, as tyrannical as this, and which, equally with this, interfere with the liberty to contract The decision sustaining an eight-hour law for miners is still recent. *Holden v. Hardy* . . .⁵²

Against that background, we might ask Posner: Why do you say that Holmes' dissenting opinion 'does not join issue sharply with the majority' and 'is not scrupulous in its treatment of the majority opinion? Why do you not critically engage with the Court's opinion, especially its problematic reading of the *Holden* precedent, so as to provide a context with which to do justice to Holmes? Do you not critically engage with it because your particular 'language of economics' (not '*the* language of economics', as you call it) fails to address the kind of power inequality that was at issue (*Equality)?

⁵² *Lochner* 75.

Voice

‘As civilized human beings,’ remarked Michael Oakeshott in *The Voice of Poetry in the Conversation of Mankind* (1962), ‘we are the inheritors, neither of an inquiry about ourselves and the world, nor of an accumulating body of information, but of a conversation, begun in the primeval forests and extended and made more articulate in the course of centuries.’¹ Concerning this use of ‘civilized’, Oakeshott claims that it ‘is the ability to participate in this conversation, and not the ability to reason cogently, to make discoveries about the world, or to contrive a better world, which distinguishes the human being from the animal and the civilized man from the barbarian.’² Oakeshott imagines this ‘conversation’ as a ‘meeting-place’ in which different forms of expression, such as ‘science’ and ‘poetry’ and ‘practical activity’, engage with each other. At this meeting place one form of utterance does not have privileged standing over any other form of utterance: ‘voices which speak in conversation do not compose a hierarchy.’³ Further, on the matter of relations: conversation ‘is impossible in the absence of a diversity of voices: in it different universes of discourse meet, acknowledge each other and enjoy an oblique relationship which neither requires nor forecasts their being assimilated to one another.’⁴ Oakeshott’s conversation metaphor can serve as a suggestive point of departure for tuning in to White’s work.

* * *

In a bibliographical note in *The Legal Imagination* White directs his reader to ‘a rather small body of literature dealing with the lawyer’s use of language that might be directly useful to you in this course.’⁵ One of the ‘best works’ is ‘Gibson, “Literary Minds and Judicial Style,” 36 *N.Y.U.L. Rev.* 915 (1961).’⁶ This is Walker Gibson. In

¹ M Oakeshott, ‘The Voice of Poetry in the Conversation of Mankind’ in *Rationalism in Politics and Other Essays* (1962) 197, 199.

² Ibid.

³ Ibid 198.

⁴ Ibid 198-9.

⁵ *The Legal Imagination* 968.

⁶ Ibid 969.

1946, Gibson took up a position as a composition teacher at Amherst College, a position he held until 1957, when White was on the other side of the podium. Gibson taught under the leadership of Theodore Baird (*Questioning), to whom Gibson dedicated his composition course book *Seeing and Writing* (1959). Gibson's book is recognized as a contribution to talk about 'voice' in composition pedagogy.⁷ White's *The Legal Imagination*, which is also dedicated to Baird, offers a similar contribution. Gibson's essay, which has been 'unjustly neglected' according to Richard Posner's *Law and Literature* (1988),⁸ can help us work our way into White's voice-talk.

Gibson's essay begins with the claim 'that certain terms and attitudes familiar to modern students of literature and language can be of direct and practical use to writers of legal compositions.'⁹ Key questions – 'questions familiar to the literary man and the teacher of composition'¹⁰ – for him are as follows:

- 1) To whom am I talking – who is my reader?
- 2) What do I want my reader to do?
- 3) Who am 'I' – that is, what sort of speaking voice shall I project by the manner in which I compose my language?
- 4) What relation should I express between this 'I' and my reader – should I be formal or informal, distant or intimate? To use the literary term, what is my *tone*?¹¹

For Gibson, composing is not a solitary act; it is a collaborative enterprise, in which an 'I' and a 'reader' form a 'relation' of some kind.

In engaging with those questions, Gibson uses the terms we apply to relations in our social lives – terms such as 'equality' and 'reciprocity' and 'liberty' – to describe the form of relations we can sense enacted in the judicial opinion. On the fourth question, for example, he says:

⁷ See D Bowden, 'The Rise of a Metaphor: 'Voice in Composition Pedagogy' (1995) 14 *Rhetoric Review* 173, 178 and 182-83.

⁸ R A Posner, *Law and Literature: A Misunderstood Relation* (1988) 289. Posner does not engage with Gibson's essay. He only mentions it after making this remark: 'Investigating the literary properties of judicial opinions is not a new undertaking.'

⁹ W Gibson, 'Literary Minds and Judicial Style' (1961) 35 *New York University Law Review* 915, 915.

¹⁰ *Ibid* 921.

¹¹ *Ibid*.

If the reader is not in every sense an equal (and he often is), then he is at least an educated and serious person entitled to be treated with respect. It is obvious that he should not be slapped on the back with wisecracks and jocularities; neither should he be spoken to as if he were somehow intransigently stupid in the face of 'plain meaning.' He should not be addressed at undue length, in paragraphs wordy and windy, for the tone should imply two busy men, writer and reader, both perfectly capable of following an argument that is succinct, and efficiently composed. Most important of all, the writer must not assume that the reader is necessarily ready to adopt his position; the writer's own display of logic is not inevitably dazzling. It is in this sense that 'good humor' is appropriate – a recognition of contrary yet reasonable conclusions. Indeed *style* may be our best way of suggesting exactly such recognitions. 'It is style,' Robert Oppenheimer has written, 'which complements affirmation with limitation and with humility; it is style which makes it possible to act effectively, but not absolutely; it is style which, in the domain of foreign policy, enables us to find a harmony between the pursuit of ends essential to us and the regard for the views, the sensibilities, the aspirations of those to whom the problem may appear in another light; it is style which is the deference that action pays to uncertainty; it is above all style through which power defers to reason.'

The great danger, surely, in the style of appellate judges is that 'limitation' and 'humility' are too often sacrificed in the interest of 'affirmation.' In their effort at dignified conviction, judges may lose a sense of life's mystery and complication, and by adopting too lofty a tone, they remove themselves from their readers. This metaphor of 'loftiness' is familiar. . . . [M]any judicial opinions, as they are actually composed, do give an impression of loftiness, assurance, and irrefutability that may very well misrepresent the judge's true feelings. . . . There may . . . be a direct relation between a judge's inner qualms and his outward show of undeniable logic! Thus it seems to be a familiar joke among some ironic observers that when a judge (some other judge) begins a sentence with a term of utter conviction ('Clearly,' 'Undeniably,' 'It is plain that . . .'), the sentence that follows is likely to be dubious, unreasonable, and fraught with difficulties. To a layman, this is a very strange state of affairs. . . .

The words of wisdom, then, that the judicial writer may expect to hear from a sympathetic literary observer may sound a good deal like those any freshman composition class might hear from the same source. Decide who your reader is and write to him. Decide who *you* are and act accordingly. . . . If experience is complex and chaotic (and it is), say so. If your reader is your equal, and if he too recognizes the inevitable discrepancies between language and life, don't persuade him to your view of things by suggestion that yours is the

only view, inevitably logical and right. Come down to earth, where things are hard to handle. The imperfect is our paradise.¹²

What sort of speaking voice do you hear in that passage? (Let us put aside Gibson's general use of the male pronoun – he did, after all, write his essay before the abundance of feminist criticism that directed attention to this matter.) Shifts between formal and colloquial expression, so as to avoid the 'lofty' tone that he condemns? And a conversational rhythm (which includes short sentences combined with longer sentences), so as to establish himself as an 'equal' with his reader? We certainly do *not* have, at least by my reading, nothing but 'affirmation', in the sense of a voice telling his readers about the way the world *is*, a voice overconfidently expressing a mind without any sense of its limits.¹³ Whatever 'affirmation' there might be is qualified by a sense of 'limitation'. Nothing but 'affirmation' would present itself, for example, in a propositional 'style' flowing from first principles, all in a single, formal tone, leading to what is 'logical and right', to a manifestly 'plain meaning'. Gibson's multi-vocal performance may be our best way of providing a sense of limitation and of keeping us 'down to earth', and thus in touch with 'a sense of life's mystery'.

Whatever voice you might heard in the passage from Gibson, he attends to the 'fact' (not: Fact) that every writer addresses a reader and in the process establishes a relationship of one kind or another with that reader, not the least in the tone of voice adopted. In the concluding section of his essay (after a suggestive engagement with a Learned Hand opinion, which offers 'an example of good style'), Gibson extends his suggestions about an unavoidable political and ethical element in writing and on criteria for judging relations:

The problem of composing good judicial writing cannot finally be so very different from the problem of composing any kind of good writing. The issues to be faced are the same, and in the argument I have been presenting here, they come down pretty simply to a recognition of the virtues of one's reader. If I can *recognize* my reader, if I can see in him a person of discretion and taste, one who shares with me a sense of the world's multiplicity and a sense

¹² Ibid 923-5 (footnotes omitted).

¹³ What I would tentatively call 'affirmation' is present in the passage. Consider, for example, these claims about reality: 'If experience as complex and chaotic (and it is) . . .'; 'the inevitable discrepancies between language and life'; and 'The imperfect is our paradise.'

of the tenuous relation between language and experience, then I am all right. By recognizing him, I define him, and we may hope to communicate across the guarded boundaries that divide us.

The writer of legal documents, of whatever sort, may be doing himself an injustice if he fails to accept such an ambitious and high-minded notion of his art, choosing instead to think of himself as a relatively mechanical and lowly worker in words. Not so. There is no reason why almost any piece of legal writing – and certainly judicial writing – may not move us with its sensitive and wise and gracious handling of language. It is true that the legal writer operates within limiting situations, and he must attend painstakingly to the minutiae of facts that confront him. Yet it is also true that he is engaged in expressing in words the chaos of life, and no poet can say more. Judicial opinions and poetry are obviously not identical forms of expression; yet, in Frost's memorable phrase about poets, the legal writer too is attempting 'a momentary stay against confusion.' It is hard to think of a finer thing to do.

A curious humility, or an equally curious arrogance, is apparent in the attitude that legal writers sometimes express toward their performances in language. One hears a lawyer or a judge remark, 'Oh, I'm no stylist – I just write down the facts in plain words.' This is both humble and arrogant – humble in surrendering elegance to the 'creative artists,' arrogant in suggesting that only 'the facts' really matter. But the situation is surely quite otherwise. The poet or novelist, the historian, the physicist, the appellate judge are all deeply involved in one essential responsibility: the expression of life's complexities in mere man-made words. Wherever he starts, whatever trivial item of human experience he initially confronts, the legal writer can make his stab at eloquence. If Holmes was right, that 'a man may live greatly in the law as well as elsewhere,' then the consequence is that he must *write* greatly, for in law as in literature there is no other meaning of greatness.¹⁴

Gibson here makes some claims that White echoes and elaborates on at great length. For one, White has much to say, in *The Legal Imagination* and elsewhere, on the similarities between 'good judicial writing' and 'any kind of good writing', especially as they concern 'the expression of life's complexities in mere man-made words'. (A voice-centered study of the *activity* of composition surely offers a way to transcend disciplinary boundaries – *Activity.) Also, he has much to suggest about the lawyer and judge pursuing 'a momentary stay against confusion' à la Frost. Such a pursuit may seem almost natural for one who has 'a sense of the tenuous relation between

¹⁴ Gibson, op cit, 930.

language and experience.’ This pursuit can be readily connected with talk about ‘virtues’ (not the least of which are ‘hope’ and ‘justice’, talk promoted by White.¹⁵ This talk opens the door to questions relating to, for example, ‘sensitive and wise and gracious handling of language’.

* * *

In the opening chapter of *The Legal Imagination*, after stressing that ‘language . . . is not merely a way of communicating information but a way of expressing and managing relations between people,’¹⁶ White offers these questions:

1. The expressed sense of the relationship, as it is or as the speaker hopes it will be, can be called the tone of voice. What tones of voice can you identify in . . . various legal statements you can think of? Consider the statute; the will; the negotiating session; the complaint; an opinion letter; and how fatal it might be for a writer to adopt the wrong tone of voice in any of these documents. Are there tones of voice that are peculiar to the lawyer?
2. The phrase ‘tone of voice’ can apply to qualities of spoken as well as written speech. We are all sensitive to variations of this kind and what they mean. Consider: ‘The Tone in preaching does much in workeing upon the peoples affeccion. If a man should make love in an ordinary tone his Mistress would not regard him, & therefore hee must whine. If a man should cry fire or Murthur in an ordinary Voice no body would come out to helpe him.’ John Selden, *Table Talk* (Preaching, 6) (1689). What are the tones of voice, in this auditory sense, that the lawyer must master?
3. I hope that out of your thinking about these questions comes a sharpened sense of the difficulties you will face in your life as a lawyer, and that to conceive of the lawyer as writer is a complication for you. When the heart of a passage can be said to be the relationship it expresses between speaker and audience, the management of speech becomes critical to one who, like you, must live and work through his relationships with others. Think of the mistakes one might make: you can easily imagine a lawyer addressing a judge in a manner appropriate for the jury, for example, or a client in a manner suitable for argument to a judge, with disastrous consequences. You could correct such an error of the lawyer in question were your junior: ‘That’s jury talk, not

¹⁵ There has been a revival of interest in ‘virtue’ in many academic circles. Alasdair MacIntyre’s *After Virtue* (1982) has been a major impetus.

¹⁶ *The Legal Imagination* 38.

judge-talk' or 'your opinion letter sounds like a brief.' What sorts of mistakes in managing social relations . . . can you imagine?¹⁷

Who is this person speaking? What tones of voice can you identify? What relationship does White establish with his reader? Does he see in her or him a person who shares with him a sense of the world's multiplicity and a sense of the tenuous relation between language and experience? White may be heard exercising his habits of 'hope' (*Hope), including the hope of rehabilitating the ordinary - 'We are all sensitive to variations of [tone] and what they mean.' To this end, he directs our attention to the inescapable political and ethical elements of speaking. In this respect, his use of 'heart' to talk generally about 'a passage' is an apt integrative metaphor to the extent that it suggests that feeling and thinking are intertwined (*Integration).

A central distinction in *The Legal Imagination* is between 'the mind that tells a story and the mind that gives reasons': 'one finds its meaning in representations of events as they occur in time, in imagined experience; the other, in systematic or theoretical explanations, in the exposition of conceptual order or structure.'¹⁸ The first 'is given to narrative' and the second 'to analysis'. With reference to 'conversation', White suggests that there is a place within us, as lawyers, for the integration of the two:

Each works in his own way, and it is hard to imagine a conversation between them (what does the economist really have to say to the novelist, after all, or vice versa?); but however inconsistent these voices seem, the lawyer must recognize both of them within himself. That he must master theoretical and analytic speech is plain enough, for this is the stuff of most legal reasoning and argument, of law texts and classrooms. This is the language in which rules are proposed, holdings defined, distinctions drawn. It should be equally evident that he must know how to tell a story, and how to listen to one: he starts with the story the client tells him, and questions him about it; he then tells the story over and over again to himself and to others, shifting the emphasis as the case proceeds, constantly varying the terms of his narrative but coming at last to a version (or perhaps more than one) cast in terms of legal conclusion. The lawyer, one might say, begins with his client's story and ends in the court of appeals, arguing a point of statutory interpretation or constitutional law.¹⁹

¹⁷ Ibid 38-39.

¹⁸ Ibid 859.

For White, the lawyer is not one voice or self, but several. The self is not a discrete unit but a place of 'conversation', of 'inconsistent . . . voices'. Attention to this actuality is a point of departure to a line of inquiry, or a conversation, relating to 'integration'. Several questions immediately come to mind: How can the lawyer create a plausible harmony among the voices within? Might she begin by tuning in to the Other, in whom she may find herself? How might she begin an explorative conversation with the hope of coming to a sound judgment?

In the penultimate chapter of *The Legal Imagination*, White has more to say about 'conversation'. White notes that it might be claimed that law is more 'argumentative' in nature than the kind of talk we would call 'conversation'.²⁰ Such a claim is the material of a writing assignment. A question here is this: 'What is it about legal argument that makes it the occasion not for the inflamed stupidities of most public discourse or the endless contradictions of an ordinary quarrel, but for thinking and speaking well?'²¹ In working out a response, White invites us to consider these words:

Opposing parties are often so furious that between them no conversation is possible at all: each thinks he is right, and generous to boot, and as for the other – ! Imagine what two angry litigants might say to one another if they met to discuss their differences, or even to submit them to decision by another. That is what you would call a quarrel, and at least potentially there is such a quarrel, such a complete social and intellectual breakdown, in the background of every legal case. You might draft a page or two of such dialogue. Now imagine the same dispute carried on by two lawyers, in negotiation or trial. There may be forcefulness of expression, there may be emotion, there may even be bad behavior; but there is form to it all, a sense of what one does and does not do, and this gives the argument shape and motion. Where does this sense of form, this energy for order, come from and how does it operate? Legal argument is a process by which hostility is at once expressed and controlled, at the same time and by the same means. Can you explain how this miracle occurs?²²

White here seems to suggest that 'the same dispute carried on by two lawyers' is something of a 'conversation' at the edge of non-conversation. This is a form of talk

¹⁹ Ibid.

²⁰ Ibid 806.

²¹ Ibid 807.

²² Ibid 807-8.

that, as White suggests, has a real mystery to it, and we may do well to attend to this mystery. After giving some thought and expression to that which White calls a 'miracle', we might be tempted to adopt White's word, which may well be a conversation-stopper for some lawyers. But why should it be a conversation-stopper? Might it not be a conversation-starter, if only it prompts some legal positivist to comprehensively clear a matter up? The positivist, after all, might find uprooted every understanding on which she has founded his social expectations and her sense of herself. She can then make a contribution to the law and literature movement with the hope of creating an integrated self and of being understood by likeminded people wanting to become whole.

* * *

Shall we compare White's voice talk with . . . ? In *Heracles' Bow*, White identifies a resemblance between his approach to language and the cultural critic Mikhail Bakhtin's approach. Bakhtin's work 'roots all education, all cultural competence, all sound criticism, and all cultural change in "many-voicedness"'.²³ Bakhtin offers his readers rich 'voice'-centered language for talking about the self. Consider the following passage from Wayne Booth's introduction to Bakhtin's book on Dostoevsky:

We come into consciousness speaking a language already permeated with many voices – a social, not a private language. From the beginning, we are 'polyglot,' already in a process of mastering a variety of social dialects derived from parents, clan, class, religion, country. We grow in consciousness by taking in more voices as 'authoritatively persuasive' and then by learning which to accept as 'internally persuasive.' Finally we achieve, if we are lucky, a kind of individuality, but it is never a private or autonomous individuality in the western sense; except when we maim ourselves arbitrarily to monologue, we always speak a chorus of languages. Anyone who has not been maimed by some imposed 'ideology in the narrow sense,' anyone who is not an 'ideologue,' respects the fact that each of us is a 'we,' not an 'I'. Polyphony, the miracle of our 'dialogical' lives together, is thus both a fact of life and, in its higher reaches, a value to be pursued endlessly.²⁴

²³ J B White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (1985) 116. For some detailed connections between Bakhtin and White, see R West Jr, 'Mikhail Bakhtin and Change in the Common Law' (1997) 72 *Washington Law Review* 291.

²⁴ W C Booth, 'Introduction', in M Bakhtin, *Problems of Dostoevsky's Poetics* (1984) (ed and trans C Emerson) xxi.

We can be sure that Bakhtin would have little interest in working with the famous affirmation 'I think, therefore I am', which directs attention away from our 'dialogical' natures. As we have heard repeatedly, White suggests that a person, lawyer and non-lawyer alike, is not an isolated, individualistic 'I' but a multi-vocal 'we'.

A feature of writing that Bakhtin calls 'dialogic' is that it self-consciously addresses a reader, one who is situated differently from the writer and who is expected to talk back,²⁵ not the least because that which we call 'understanding' cannot be perfect. 'Monologic' writing assumes the adequacy of its own talk and thus assumes an objective meaning. In his book on Dostoevsky, Bakhtin invites his reader 'to renounce their old monologic habits so that we might come to feel at home in the new artistic sphere which Dostoevsky discovered'.²⁶ This invitation calls on the reader's imagination to transform itself. Such a call will be familiar to the White reader.

Justice as Translation opens with one of Ludwig Wittgenstein's famous remarks ('To imagine a language is to imagine a form of life.') The remark, says White, 'may be taken as the text to which all that follows is addressed'.²⁷ With the hope becoming better equipped to listen to 'all that follows', White's reader may do well to read some Wittgenstein criticism. Let us do so.

In 2004, David Stern published an introductory commentary on Wittgenstein's *Philosophical Investigations* that gave particular attention to 'style'. Stern resists the claim, made in Saul Kripke's *Wittgenstein on Rules and Private Language* (1982), that Wittgenstein's principle philosophical contribution was to make a case for a new skepticism about following a rule. Let Stern speak:

Like Kripke, Wittgenstein's interpreters rarely pay much attention to the character of the dialogues in which the particular position and arguments they extract from the text are debated. It is commonly taken for granted that the conversational exchanges that make up the *Philosophical Investigations* take the form of a debate between two voices. One of them,

²⁵ For an outline of 'dialogic' writing and its application to law, see C Hersch, 'Bakhtin and Dialogic Constitutional Interpretation' (1994) 18 *Legal Studies Forum* 33. At note 8, Hersch connects his work to White's: 'For a striking attempt to think about dialogue and legal interpretation that is neither explicitly Bakhtinian nor postmodernist, see James Boys White, [*When Words Lose Their Meaning*]'.

²⁶ *Problems of Dostoevsky's Poetics*, op cit, 272.

²⁷ *Justice as Translation* ix.

usually identified as 'Wittgenstein', supposedly sets out the author's views, while the other voice, usually identified as 'the interlocutor', plays the role of the naive stooge or fall guy. On this approach, the debate between the two voices is 'simply a stylistic and literary preference', a superficial feature of the text. . . . For these readers, the principal task of the interpreter is to extract 'Wittgenstein's' train of argument and his solutions to familiar philosophical problems from his unusual way of writing, and present them in an accessible and clear-cut way.

However, if one reads the *Philosophical Investigations* in this way, it then becomes very hard to explain why 'Wittgenstein' is also so dismissive of philosophical problems, and why he proposes a way of doing philosophy that is very different from the problem-solving approach Kripke takes for granted. For the book also insists, in a voice that is clearly not the interlocutor's, that traditional philosophical problems are more like a disease than a question in need of an answer, and that the author's own approach to philosophy aims, not to solve those problems, but to dissolve or undo them – to get us to see that they are nonsense. . . .

. . . [T]his book proposes that we distinguish between two different voices, voices that are usually lumped together as 'Wittgenstein's'. . . . Readers who focus mainly on what Wittgenstein's narrator has to say usually give a Kripke-style reconstruction of the *Philosophical Investigations* in terms of traditional philosophical argumentation, as consisting of reasoned argument that aims to solve philosophical problems. Readers who focus only on what Wittgenstein's commentator has to say often regard the argument as no more than a means to an end: the dissolution of philosophical problems and the end of traditional philosophy. One aim of this book is to do justice to both sides of the *Philosophical Investigations*, and so help the reader see how its argumentative aspect and its therapeutic aspect are actually complementary and interwoven.

This, then, is . . . [a] leading theme of this introduction to the *Philosophical Investigations*: the problems raised by the multiplicity of voices and perspectives it contains, the question of how best to understand the relationship between those voices and the author's intentions, and the related question of what conclusions the reader should draw from his or her examination of this tangle of trains of thought. In other words: where does Wittgenstein's argument lead us? . . .

. . . [W]e need to see that the way [the *Philosophical Investigations*] is written invites each of us to find what one might call 'my Wittgenstein' there. Because the book takes the form of a dialogue, a dialogue without clearly identified voices or boundaries, each reader has to work out for him- or herself what positions are being attacked and defended, and in so doing, will inevitably find his or her concerns addressed there. . . .

... [M]y principal aim in this book is to help readers interpret the dialogues of the *Philosophical Investigations* for themselves. Whether or not readers agree with my particular interpretation of Wittgenstein's intentions, once they are aware of the range of possible approaches to these questions about the author's intentions they will be much better equipped to make up their own minds as they read the *Philosophical Investigations* for themselves. Wittgenstein says in the preface that he would not like his writing 'to spare other people the trouble of thinking. But, if possible, to stimulate someone to thoughts of his own.' The aim of this introduction to that book is not to spare other people the trouble of thinking about the *Philosophical Investigations*, but rather to provide readers with an orientation that will enable them to read that book in ways that will stimulate thoughts of their own.²⁸

That passage may serve as a valuable resource for talking about the activity of interpreting a 'literary' lawyer. Might we do well to avoid imagining that our 'principal task' is to 'extract' White's 'train of argument ...'? Might we do well to imagine that the way in which *Justice as Translation* (along with his other works) is written invites each of us to find what one might call 'my White' there? Those questions may help us to 'do justice' to White's work.

How should we talk about justice? White directly responds to that question in the penultimate chapter of *Justice as Translation*. Here is one fragment:

Imagine for the moment that I am speaking to you not in writing but face-to-face, and that in an effort to make a new start, I say: 'I want to talk to you next about justice and translation.'

So I want to begin. But what kind of sentence is that? It makes 'justice' and 'translation' nouns, or nomens, as if they were entities in the world that could be named – pointed out and referred to – by these words, which of course there are not. . . .

And I say 'I' and 'you' with great assurance, as though there were one 'me,' who 'wants to talk,' and one 'you,' who is expected to – to what? 'listen?' 'receive?' 'understand?' Or simply do nothing, not to be there in the discourse at all? (Does my talking imply no correlative activity on your part?) Certainly there is no suggestion in my opening sentence that you 'want' anything, that you have a will or a set of desires; and no suggestion either that each of us is actually a set of multiple selves, speaking and acting sometimes in discord, sometimes in harmony. . . .

²⁸ D G Stern, *Wittgenstein's Philosophical Investigations: An Introduction* (2004) 3-9.

In this chapter and the next I want to say: . . . that translation . . . is a model of law and justice, for these two are at their heart also ways of establishing right relations, both between one person and another and between a mind and the languages it confronts.

But what can it mean for me to try to 'say' such things? For example, will I simply trace out a mechanical analogy between two sets of practices, translation and the law, observing correspondences and differences, as if the whole world could be described in terms of interacting parts, as a kind of machine, in a language that mirrors such a reality – as if language were simply a system for naming? When I come to talk about the art of recognizing another and respecting difference, which is my true subject, will I find a language adequate to the task or will I reduce myself to clichés about 'empathy' or 'diversity'?

In this chapter I have been speaking as it were dialectically, saying one thing and then responding to myself in a somewhat different voice, and I shall continue to do this. In talking in this odd and double way, I am trying to direct your attention to a central expectation that we all have about a disquisition of this sort: namely, that in it I will try to 'say' something either in direct propositional form or in the kind of extended analogy that is a set of propositions in another guise. 'I will try to utter propositions that are clear: you will try to apprehend then, so that you may test their validity in your own way.'

But all that is to presuppose a view of language and of conversation I wish to resist, with which indeed my views of 'translation' and 'justice' are inconsistent. So I write and speak against the very force of the language I am using, against the occasion of my writing, against the expectations that bring us for this moment together. The question for me and for you is, then, Can I make a text that will embody or enact the view of language – of 'translation' and 'justice' – out of which I function and do so in a way that will be of use to you?

So I want to say: Do not look for propositions here, for conceptual elaborations and extended analogies, for anything stated, but for movement, for shifts in the meanings of words. Listen to the voices: my voices and your own, as you hear yourself respond in different ways to what I say. There, in the music the voices make, whether beautiful and harmonious or raw and ugly, is where the meaning lies; it is to that music that our attention and judgment should above all be directed.²⁹

²⁹ *Justice as Translation* 229-31.

Imagine for the moment that White has just stopped speaking to us face-to-face and that in an effort to continue the conversation, I say: 'Professor White, I want to do justice to your talk about justice and translation.'

So, one of my 'multiple selves' has spoken, and another self is now saying so.

What sort of sense are you and I to make of that last sentence? Perhaps you and I can quickly agree that the sentence is not worthy of our attention.

With what tone did I say 'you' and 'I' in the previous sentence? (As you might imagine, 'I' am smiling as 'I' type these words.)

Is this a parody of 'White', you might ask? Maybe it is an attempt. But in a good cause, for '[p]arody trains the ear as almost nothing else can do.'³⁰ It may be that 'I' am not equal to the task of writing a parody that is funny or illuminating. Or perhaps it is not impossible that I could make a parody of a mind or style I admire? Perhaps 'you' are like some White critics and do not admire White's style and 'you', unlike 'me' find this 'parody' funny?

Which one of 'you'?

Do 'I' really want to try and start talking in the strange way that the many persons lumped together under the name 'White' talks?

Why 'strange'? Don't we talk like that all the time? Isn't what seems strange really quite familiar? Is this way of talking not a way of trying to direct attention to the 'literary' conditions of our existence, conditions that render abstract 'theoretical' talk to be of limited value, especially when pursuing the task of the law, namely 'justice'?

* * *

Beginning with his reading, in *When Words Lose Their Meaning*, of Chief Justice Marshall's opinion in *McCulloch v Maryland* (*Constitution), White's judicial criticism centers on 'voice'. Let us now turn to join him in *Justice as Translation*.

In the year 1928, the United States Supreme Court was called upon, in *Olmstead v United States*,³¹ to interpret the words 'searches' and 'seizures' as used in the Fourth Amendment.³² Olmstead had been convicted of unlawfully transporting and selling

³⁰ *The Legal Imagination* 957.

³¹ *Olmstead v United States*, 277 US 438 (1928).

³² 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

liquor under the National Prohibition Act. He challenged evidence obtained by means of (illegal) wire-tapping. A central issue for the Court was whether the wire-tapping operations of the government agents were a 'search' and 'seizure' in violation of defendants constitutional rights. The Court divided. Chief Justice Taft, for the majority, ruled against Olmstead. Here is a central passage in his judicial opinion:

The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceedings lawful, is that it must specify the place to be searched and the persons or *things* to be seized.³³

The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.³⁴

What are we to think of the metaphor 'shows'? Let Gibson's words ring in our ears: 'If the reader is not in every sense an equal . . . , then he is . . . entitled to be treated with respect. It is obvious that he should not be . . . spoken to as if he were somehow intransigently stupid in the face of "plain meaning".' Don't we all at least occasionally forget what is 'obvious'?

White, in *Justice as Translation*, reads *Olmstead*. He resists, and he invites his readers to resist, the 'authoritarian', the conversation-stopper:

Upon what . . . does Taft rely in his effort to make his conclusions persuasive to his reader? I think that he relies more than anything else upon the very power of characterization that he has exemplified throughout his opinion, upon the voice of authority with which he has been speaking. His ultimate ground is literary and ethical in nature: who he has made himself, and his readers, in his writing. For he repeatedly characterizes both the facts and the law with a kind of blunt and unquestioning finality, as if everything were obviously and unarguably as he sees them. . . . [H]e makes a character for himself in his writing and then relies upon that created self as the ground upon which his opinion rests. This character is

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

³³ *Olmstead*, op cit, 464.

³⁴ *Ibid*.

not that of Frankfurter's man of educated sensibility, but, as I will suggest more fully below, that of a simple, even simple-minded, authoritarian.³⁵

White works in detail to characterize the 'authoritarian' as the one who uses or talks about 'language' in a certain way, in particular, 'not as a field of action but as if it were transparent or neutral, merely a way of pointing to something outside of itself.'³⁶ For White, the simple binary opposition of literal versus figurative is problematic. A self-identified 'literal' approach to reading cannot be what it claims to be:

But since there is in fact no such thing as a 'literal' reading of words, that repudiation of ambiguity and complexity itself works as an unexposed, unexplained, and unjustified claim to authority, including the authority to reduce difficulty to simplicity – a claim that is in fact implicit in every claim to read language 'literally.' And the claim that one is simply reading plain language in a plain way not only creates a false pretense of submission to external authority, it also creates a false pretense of democratic alliance with the ordinary reader against the obscurantist lawyers. But behind these pretenses, power is taken both from the text and from the reader.³⁷

To be divested of power, as White suggests, may be attractive: 'it relieves us of the task and responsibility of facing what is difficult, complex, and uncertain, of making judgments of our own, of responding as ourselves.'³⁸ The attraction to so-called literalism may stem from a fear of social anarchy or chaos, or perhaps from a failure to imagine a distinction between authority and authoritarianism.

White's attention to voice is aided with the dissenting opinion of Justice Brandeis, who rejected what he called 'an unduly literal construction' of the Fourth Amendment.³⁹ In doing so, he engaged with the Court's opinion in *Boyd v United States*,⁴⁰ in which the history of the Fourth Amendment was reviewed. From his engagement, Brandeis went on to frame *Olmstead* as being concerned with the basic

³⁵ *Justice as Translation* 145.

³⁶ *Ibid* ix.

³⁷ *Ibid* 147.

³⁸ *Ibid* 148.

³⁹ *Olmstead* 476.

⁴⁰ *Boyd v United States*, 116 US 616 (1886).

issue of ‘government . . . invading privacy’.⁴¹ Here is a central passage in his judicial opinion in support of Olmstead’s claim:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.⁴²

In my reading of that passage and the words that surrounded it Gibson’s words ring again. Here is not just ‘affirmation’ but also ‘humility’. Here is a composition that does not ‘lose a sense of life’s mysteries’.

White engages with Brandeis’ opinion at length, and not surprisingly speaks approvingly of it. After quoting the passage immediately above, White offers these words of endorsement:

This is a translation not only into contemporary legal language but beyond it, into contemporary ordinary language, into the vernacular. It thus invites a conversation not only among lawyers but among citizens, a conversation that is in a sense democratic. But this language does not supplant the law—the last thing Brandeis would argue for is the elimination of our cultural past in favor of the uninformed view of the moment. It is in fact his work with the legal language preceding this passage that has both made possible and justified this return of the constitution to the people.⁴³

White here mixes ordinary (‘conversation’) language with legal language (a mixing that creates a sort of double voice) in his approval of one who does the same kind of mixing in the service of ‘the people’.

* * *

⁴¹ *Olmstead*, 473.

⁴² *Ibid* 478.

⁴³ J B White, ‘Judicial Criticism’ (1986) 20 *Georgia Law Review* 835, 864. This essay is reproduced in *Justice as Translation*.

In *Law and Literature* (1988), Posner reads the passage just quoted from Brandeis. Just before quoting the passage, Posner tells us that Brandeis's 'style . . . is the style of the sledgehammer.'⁴⁴ After quoting it, Posner offers these words of disapproval:

The staccato style of Brandeis's dissent (sentences of roughly equal length, starting the same way, and full of lists – 'their beliefs, their thoughts, their emotions,' and so on – and repetition, notably of 'they' and of 'their') conveys a distracting sense of Brandeis's own excitement, making the reader wonder whether Brandeis may not have been projecting onto the long-dead framers his own vision of a just society. It is also a hectoring style; it grabs you by the lapel and shouts in your face, demanding your assent rather than engaging you in a discussion. This and its emotionality make it a discordant style in which to celebrate the classical liberal ideal of personal autonomy.⁴⁵

What sort of speaking voice do you hear in that passage? Does Posner do justice to Brandeis' voice?

On what does Posner rely in his effort to make his claims persuasive to his reader? Does he tune in via Taft's opinion (like White does)? If Brandeis 'shouts in your face', what on earth does the authoritarian *plain meaning* Taft do? Posner does no tuning in. He has absolutely nothing to say about Taft's opinion. You might ask what else he has to say about *Olmstead*. The answer is nothing. He offers no context with which we can tune in to the voice which he talks about so that his reader can have some sort of place from which to judge for herself or himself. How might we talk about Posner's style? Does his word 'sledgehammer' fit?

With their divergent responses to the passage from Brandeis, the question we might do well to ask this: Does White or Posner have the sharper ear for capturing Brandeis' tone of voice? Part of a response to that question will require attending to the voices of White and Posner, for our hearing here will influence what we make their written words mean. (Here we have voices within voices within voices within voices – an echoing that perhaps is only possible as the result of writing technology, which ironically seems to deaden us to sound.⁴⁶) We readers of White and Posner may well differ markedly among ourselves on the tone of each of them.

⁴⁴ R A Posner, *Law and Literature: A Misunderstood Relation* (1988) 292.

⁴⁵ *Ibid* 293.

⁴⁶ W Ong, *Interfaces of the Word: Studies in the Evolution of Consciousness and Culture* (1977) 275.

Putting aside for the moment the possible differences between them and between us, both White and Posner direct attention to the importance of the speaking voice in the law. Both suggest that much is at stake, including what is to become of the law, when a judge speaks one way rather than another. In this, White and Posner are in harmony with one another.

* * *

The voice metaphor has a significant place in several reviews of *Justice as Translation*. Let us begin with Mark Tushnet's *Translation as Argument* (1990), which begins as follows:

James Boyd White has pulled off a major accomplishment: he made me want to write a defense of Richard Posner in the most occluded and bureaucratic prose. My desire results in part from some obvious defects in White's arguments, particularly with respect to what he defines as 'economics' and 'philosophy,' and in more substantial part from the manner in which White presents his arguments. I should say at the outset, so that what follows may be discounted appropriately, that I respond to White's manner of presentation as most people respond to fingernails raking across a blackboard. . . .

White has a rather old-fashioned view of philosophy For him, philosophy consists of efforts to develop a propositional and conceptual language' that will have 'authority . . . of naturalness.' This language is 'inherently aggressive: the idea is to stake out certain intellectual terrain with the force of one's logic, or by the demonstration of certain facts, against an audience assumed to be hostile, who will be persuaded only if compelled.' In contrast, the 'literary method . . . proceeds . . . on the assumption that our categories and terms are perpetually losing and acquiring meaning, that they mean differently [sic] to different people and in different texts. It is not a territorial claim but an invitation to reflection.'

What is puzzling . . . is that White claims Ludwig Wittgenstein for the 'literary method' taking 'as the text to which [the book] is addressed' is Wittgenstein's famous statement, 'To imagine a language means to imagine a form of life.' Today, the lesson philosophers learn from Wittgenstein is the futility of attempting to provide greater clarity for a language than that language already provides. They are not, in short, conceptualists of the sort White describes. At the same time, however, White wants to recruit Wittgenstein for a reformist project that would invite the community of lawyers, legal scholars, and readers of his book to open themselves to 'a variety of languages and voices.' For White, in law 'every speaker is

particularly located, both rhetorically and socially.’ Wittgenstein understood that principle as well, but believed that he could not proceed from there to any reformist conclusion, that the goal of philosophy was to leave everything just as it was.

With that understanding of Wittgenstein, the phrase ‘[t]o imagine a language means to imagine a form of life’ takes on a somewhat different meaning. There appear to be two possibilities. First, the language of the law that White finds so uncomfortable *is* the form of life that is the law. White may not like that form of life, but he cannot criticize the language that constitutes that form of life, that constitutes the law, for failing to respect the ‘aspirational or idealizing element[s]’ that are essential to ‘what we think of as law.’ To the extent that the language that constitutes the law lacks those elements, it is not a form of life that is aspirational and idealizing. On this view, as much as he tries to present himself as an insider to law, White actually speaks about it from the outside. Alternatively, White may truly be an insider. Then, however, his language of aspiration is already part of the law, just as the language of concepts is part of the law. If so, there is nothing to reform; the form of life that is the law is already open to ‘a variety of languages and voices,’ such as Posner’s, Dworkin’s, White’s, and mine.⁴⁷

Who is this person speaking? How does he imagine his audience? What is the relation between the speaker and audience?

The following questions may assist an engagement with those questions: Is Tushnet’s language ‘aggressive’? If not, how might we characterize it? Does he adopt a ‘literary method’?

Tushnet might have done well to say more about White’s distinction between ‘literary’ and ‘theoretical’ (or ‘conceptual’) ways of thinking and talking. As we have already heard, White does say a great deal about the distinction (*Concepts). Tushnet’s brief summary of White’s position does leave out a great deal. More significantly, Tushnet does not direct attention to the actuality of this loss. Tushnet’s failure to direct attention to the loss seems to me to be the beginning of an injustice to White, especially given the emphasis White puts on the nature and significance of ‘attention’ (*Attention). To speak of the loss could open the door to attending to the limits of his own language, which will differ from that of his own reader. To do so would be to acknowledge the existence of a reader, who will be different from him and

⁴⁷ M V Tushnet, ‘Translation as Argument’ (1990) 32 *William and Mary Law Review* 105, 105, 118-20 (footnotes omitted).

who will, given the literary conditions on which we live, read White differently. 'Tushnet' would thus become a different Tushnet, a Tushnet who is less 'aggressive' than he is.

In the echo of Stern's commentary on Wittgenstein, let us ask the following questions: Does Tushnet pay much attention to the character of the dialogues in *Justice as Translation*? Does he struggle with identifying 'White' in the echo of a struggle with identifying 'Wittgenstein'? Does Tushnet find in White's book a way of doing law – law-as-literature – that is very different from the dominant law-as-rules approach that many take for granted? Does he address the problems raised by the multiplicity of voices? If not, does this not amount to a failure to do justice to White?

Does White seek 'to recruit Wittgenstein for a reformist project . . .'? Perhaps it is more fitting to suggest that White holds up Wittgenstein as a model for a transformative project. The law, for White, is in a constant process of transformation, and an important question concerns its direction. What, in short, is to become of the law? Wittgenstein responded to a similar question in the conversation called 'philosophy'? White, we may take it, appreciates well that Wittgenstein's polyphonic performance can serve as a standard of literary excellence in philosophy and in other conversations. White arguably has extended Wittgenstein's conversation.

What might be said about Tushnet's 'discount' remark – 'I should say at the outset . . . that I respond to White's manner . . .' Lest we forget that in one person there are many people, let's ask, Which 'I'? That response might serve as a productive disorientation for Tushnet and for his readers who fail to hear an injustice in the words that follow his remark.

Speaking of orientation, does White, in *Justice as Translation* and elsewhere, present himself as an 'insider' or an 'outsider' to law? Is that not a question of the kind White, who repeatedly cavorts with the inside/outside distinction, invites his reader to resist? Does not White, who cavorts with the commonly imagined distinction between poetry and law, present himself as an insider *and* as an outsider to law? Tushnet's failure to consider the possibility can be taken as a failure of his literary-legal imagination.

In *Justice as Translation* White keeps alive a remark made by John Dewey, namely 'Democracy begins in conversation.'⁴⁸ White goes on to place the remark in the context of law:

[W]e can say that the legal text, like every text, is a stage in a conversation and ask of it: Is this conversation one in which 'democracy begins?' If not, the consequences are serious indeed; if so, it remains to be shown how.⁴⁹

White goes on to give meaning to 'conversation' and 'democracy' in several ways, including by his own efforts at 'conversation' with his reader. How is his reader to judge his efforts?

Sanford Levinson, in *Conversing About Justice* (1991), judges White's performance. Consider these remarks:

I view this book as being far more about the abstract *desirability* of engaging in conversation than an *exemplification* of a good conversation 'in which "democracy begins".' What is given the reader is not a model of how one converses, but rather an extended, quite repetitive, monologue. Insofar as one purpose of the book is to provide a model of how to *enact* a conversation, it fails.⁵⁰

What are we to make of this judgment? Is it just?

For the purpose of responding to those questions, let us hear Levinson's justification. One fragment is as follows:

What led to my negative response to the experience of reading *Justice as Translation* was . . . White's failure to indicate any real engagement with the many other writers who are grappling with similar concepts and attempting to deal with problems as they arise. If White were portraying himself as an unabashed egoist, that would be one thing. But he presents himself as a man committed above all to conversation and the creation of supportive, multi-voiced communities. . . .

An important clue to what is most distressing about *Justice as Translation* is provided by looking at its index, where the reader will notice numerous omissions of persons who have

⁴⁸ *Justice as Translation* 91.

⁴⁹ *Ibid* 101.

⁵⁰ S Levinson, 'Conversing About Justice' (1991) 100 *Yale Law Journal* 1855, 1875-76.

contributed to the discussion of which *Justice as Translation* is a part. Most noticeable, surely, is the absence of any reference to Nietzsche. . . . Nietzsche, of course, is scarcely a bland figure committed to White's reassuring notions of equality and democratic conversation. He is also dead, so it would be hard to engage in genuine conversation with him. This is certainly not the case with Richard Rorty But Rorty also makes no appearance . . .

Among the most fruitful explorers of conversation and the implications of differing perspectives, of course, have been feminists, but no feminist author appears in the pages of this book. The most notable omission in this regard is probably Martha Minow . . .

The same can be said of those analysts of race who have emphasized the importance of developing multiple perspectives. One thinks immediately of Derrick Bell, Alan Freeman, Mari Matsuda, Richard Delgado, and Patricia Williams. . . . There is a similar ignoring of the work that has come out of the critical legal studies movement that has often insisted on . . . 'fluidity' of language that leads to 'indeterminacy' of outcomes and thus makes orthodox legal analysis, with its quest for determinate solutions, impossible. There are many ways in which White's position seems quite similar to those identified with these various branches of contemporary legal discourse – is he a 'crit' who has not yet come out of the closet? – but it is hard to tell, insofar as he relentlessly refuses to acknowledge that there is in fact a vigorous, indeed often acrimonious, conversation that is taking place all around him about the very issues that he is ostensibly most interested in.⁵¹

The first sentence in that passage is problematic, for a distinguishing aspect of White's book is its explicit resistance to talk in law about 'concepts' (*Concepts). The C-word rolled off Levinson's tongue like the N-word rolled off Huck Finn's tongue when his 'conscience' was active (*Experience). It seems to me that anyone who has 'really read' *Justice as Translation* would at the very least use nervous quotation marks when using the C-word in a 'legal' context. For me, White's book is unique in identifying 'the language of concepts' as a source of injustice to the extent that our attention is directed away from the role of language in constituting and reconstituting relations between people. White's *polyphonic conversation with his reader* about this issue, by my reading, establishes him in a *different conversation* than the people Levinson talks about. In short, contrary to him, they are not 'grappling with similar concepts'.

⁵¹ Ibid 1873-75.

When White is as 'dead' as Nietzsche, I suggest that we will do well to imagine that there is a sense that we can 'engage in genuine conversation with him'. We *can* converse with texts. Listen to David Tracy:

If we read well, then we are conversing with the text. No human being is simply a passive recipient of texts. We inquire. We question. We converse. Just as there is no purely autonomous text, so too there is no purely passive reader. There is only that interaction named conversation.⁵²

But isn't there a better name than 'conversation'? Well, perhaps so, but let us leave that question for a different conversation. White's efforts at 'speaking . . . dialectically' in *Justice as Translation* seem to me to be directed to the reader principally to direct her attention to the 'interaction named conversation' of which Tracy speaks.

Let us continue to hear Levinson out. Can he redeem himself? Can he do justice to *Justice as Translation*?

It is a deep irony, given White's attack on the language and culture instilled by economic reasoning, that Richard Posner conveys a far more vivid sense of the engaged conversationalist than does James Boyd White. Although my own views a political values are far closer to White's than to Posner's, I have the constant sense when reading Posner's recent work of a man aware of the multiplicity of voices engaging in legal arguments and making good-faith efforts to grapple with what they are saying. Indeed, what makes Posner one of the most interesting presences in contemporary intellectual life is precisely the sense that there is development in his thought, that it is truly worthwhile to engage with him. That is precisely what is absent in the recent work of White.⁵³

From what we have heard from Posner on White's work (*Listening; Metaphor; Questioning; Rhetoric), we can only be troubled by the judgment that Posner is worthy of the name 'engaged conversationalist'. In *How Judges Think* (2008), Posner still talks about 'the economics of' ('judicial behavior') as if there is one language in the 'field',⁵⁴ notwithstanding the efforts of various economists, including Klammer and McCloskey, to direct attention to the Babel in 'economics'. He still talks about the 'field' of 'law

⁵² D Tracy, *Plurality and Ambiguity: Hermeneutics, Religion, Hope* (1987) 19.

⁵³ Levinson, *op cit*, 1877.

and literature' without acknowledging problems with the territorial metaphor and with 'and'. To the extent that Levinson fails to 'engage' with White, his claim 'that it is truly worthwhile to engage with [Posner]' has a hollow ring in my ears.

* * *

Emily Hartigan's *From Righteousness to Beauty* (1992) offers some 'reflections' on *Justice as Translation* and on Richard Weisberg's *Poethics*.⁵⁵ First to *Poethics*. Given that 'the subject of literature in relation to philosophy, religion, truth, and law has long been a major intellectual pursuit' for Hartigan, Weisberg's 'learned-looking book that talked of the "poetic method for law, or how the law means" as its central theme, promised a rich read.'⁵⁶ But her experience of reading did not match her expectation:

I may have been saved from a worse experience because my own bad habit . . . of looking first at the end of a book, prevailed. At the end of *Poethics* is a section on James Boyd White. I ran through it quickly, to taste, before I sat down to read in the right order. The taste was bitter, harsh, confusing. . . . Having tapped White's notion of ethics as 'respect for the other' Weisberg concludes 'if one thing emerges clearly from [*Justice as Translation*,] it is that White has precious little respect for others.' . . . Earlier Weisberg has called White dishonest, dictatorial, colonial. . . . These are among the most distasteful of the charges Weisberg makes. . . . [T]he most central self-destructive move is that Weisberg's arguments against White are arguments against poethics—and they are not good writing, not good poetry, not, as White's texts often are, cogent, inspiring or beautiful.⁵⁷

Let us leave aside the issue of whether or not beauty is in the eye of the beholder. Hartigan suggests here that Weisberg does not practice his preaching.

Hartigan echoes Levinson's claim that White's 'conversation' would do well to be more inclusive of women's voices. Here are some related fragments in her essay:

This essay turns in several directions. One is toward Richard Weisberg, whose most recent book on law and literature, *Poethics: And Other Strategies of Law and Literature* was difficult

⁵⁴ R A Posner, *How Judges Think* (2008) 35-40.

⁵⁵ E F Hartigan, 'From Righteousness to Beauty: Reflections on *Poethics* and *Justice as Translation*' (1992) 67 *Tulane Law Review* 455.

⁵⁶ *Ibid* 458 (footnote omitted).

⁵⁷ *Ibid* 458-59 and 462-463 (footnotes omitted).

and confounding yet informative for me. One is toward James Boyd White, the founding figure in law and literature as an academic field, who has attracted considerable hostility in the past few years—to which Weisberg adds with zest. Thus another turn is toward mediation . . . Yet a further turn is away . . . from a combative, hierarchic tone of discourse surrounding the foundational patriarchal space of law and literature. Weisberg and even White make such a grating discourse likely, I venture, by their near-total exclusion of women from their texts. Rather than retreating solely to the ‘other’ version of the field . . . —the one inhabited by . . . a score of wonderful feminist writers—I want to speak for a new timbre of conversation, a new openness, even a new dance. . . . [M]y hope is neither to attain or award victory but to call forth costly, saving conversation.

Law as conversation is not primarily war through or with words, but the free yet necessary activity of community-weaving among people of profound differences. Given the negligible amount of time White and Weisberg spend conversing with or of women who have claimed their own voices, my call to them may seem initially futile. . . . [I]f I am right in agreeing with these men that beauty, poetic force, will tell in the end, then I have reason to hope. For I am concerned with them not primarily because of their ‘place,’ their status, but because I see the world as in one respect God’s wonderful joke: among the always emerging differences among persons, men are as mysterious and irresistible to women as some men have recognized women to be. If men could remember both the irresistible part *and* the mystery (for both men and women), and would open the existing public conversation, they might critique and pointedly ignore each other less violently, and enjoy a new richer company. They might even experience the awesome surprises of difference. . . . We all in the law might become more and newly—awkwardly and gracefully—human.

. . .

In one sense, Weisberg’s version is not so different from that of a studied feminist like Carol Rose. Each tells the story of law and literature from her own perspective. Rose . . . depicts narrative theory primarily through women like Robin West. She does not refer to White. Weisberg leans heavily on Cardozo. . . . Though his Preface has identified White—‘whose early efforts helped to establish the field of Law and Literature’—it is to foretell his report that White has sadly not fulfilled his promise.’ In his history and ‘strategies’ of law and literature from page one to the end of the book, he never mentions White until he begins the eulogy. He omits, in the Preface, *why* Law and Literature’s identification as a vital area of the intellectual landscape arose ‘more than fifteen years’ ago, as well as the name of the only book on the subject in the 1970s. The missing marker is the publication of James Boyd White’s *The Legal Imagination* in 1973. . . . Rose, in choosing to omit mention of White, turns

the male obliviousness to the feminine writers back on the men; how is Weisberg turning when *he* does not mention White except to report on his demise at the end of *Poethics*?

I note that I think Rose is a tad misguided. West's very title for her *Economic Man and Literary Woman*, reveals that the space White inhabited in 1973 was taboo, feminine, nonanalytic, heretical, at best marginal. Only his extensive learning, his nearly perfect scholarship combining with what might have otherwise been 'unacceptable' passion (and even a poetic cast) in his writing, cleared the way for law and literature. The influx of women into that now familiar topography attests to the very courage and singularity of White's initial work. He ventured where words *had* lost their meaning, and that is why my perplexity at his avoidance of feminine work is secondary to my respect and admiration.⁵⁸

In the echo of the 'hostility' that can be heard in some reviews of *Justice as Translation*, Hartigan's 'turn . . . toward mediation' may sound potentially productive. However, her language may hinder her efforts to do so. Concerning her talk about 'law and literature as an academic field', she would do well to tune in to White's call to resist the 'territorial metaphor of the "field" '.⁵⁹ In doing so, she would turn away from composing sentences such as this: 'Rather than retreating solely to the "other" version of the field . . . ' The sentence is problematic, not the least because it provides the base for asking inapt questions about the relations between law *and* literature rather than apt literary legal questions. Concerning her talk about the 'feminine', we might question the fittingness of the word to name 'the space White inhabited in 1973'. Also, it is unfair to say that White has 'avoid[ed] . . . feminine work'. Let me elaborate.

White's key word 'voice' emerged through his student life at Amherst College, especially in his association with Theodore Baird's composition course, English 1-2 (*Questioning). In a social and cultural history of this course, *Fencing with Words* (1996), Robin Varnum suggests that the course was far from 'feminine' in orientation. Consider these fragments:

Several of the . . . men whom I wished to interview . . . resisted my overtures. . . . When I first telephoned Roger Sale, he expressed his amazement that any woman should want to study what had amounted to an 'astonishingly masculine' enterprise.⁶⁰

⁵⁸ Ibid 455-57 and 464-65.

⁵⁹ *Justice as Translation* 13.

⁶⁰ R Varnum, *Fencing with Words: A History of Writing Instruction at Amherst College during the Era of Theodore Baird, 1938 - 1966* (1996) 33.

[Dale] Peterson said the 1968 assignments were 'typically written in a way which is Robert Frost-like, cunning, witty, but also hard-edged; it's a very masculine witticism. . . . I do think Baird comes out of American pragmatism at some philosophical level, which is to say that the course was really a course in composition and writing, but what really mattered was what works. Try this, try that, try something else. . . . And this too, I think could be argued, is masculine.'⁶¹

. . . Baird's purpose at Amherst . . . seems to have been to take a student through a process that would enable him both to define his individual voice and to declare his independence of his teacher.⁶²

[Walker] Gibson says his purpose in *Tough, Sweet, and Stuffy* is to describe 'three extreme but familiar styles in modern American prose' (1966, ix). Of the three styles, or voices, Gibson seems to prefer the tough voice of a Hemingway narrator to the sweet voice of an ad writer or the stuffy voice of a government bureaucrat. I asked him about this, wondering if there were some connection to the masculine ethos of Amherst College, and he replied, 'Twenty-five years ago, I didn't have the benefit of feminist criticism.' He added, 'If there's one thing that has changed our minds about an awful lot in reading and writing, it seems to me feminist criticism. And now I would have to look at that tough voice with its macho ego (I do at least say that it's 'I' orientated, capital 'I' orientated, as it certainly is), but I would be much more severe on it if I were to do it again, and the book would be then an exposition of three bad voices, three unattractive voices, and I suppose it would come out to a kind of warning that these are all voices in exaggerated form and to be leery of.'⁶³

It would be too easy to dismiss English 1-2 as a course designed by white males for white males. There are, without question, aspects of the course which are distasteful by today's standards. It was elitist and authoritarian. . . . But despite all this, English 1-2 . . . was a course in which teachers and students seem often to have engaged in real conversation. It was a course which seems to have enabled many students to claim authority over language and their lives. . . . The combative pedagogical style of English 1-2 would probably not work in today's classrooms.⁶⁴

⁶¹ Ibid 206.

⁶² Ibid 233.

⁶³ Ibid 243.

⁶⁴ Ibid 246.

Those passages cast doubt on the validity of Hartigan's claim that 'the space White inhabited in 1973 was . . . feminine'. Walker Gibson suggests that in the 1970s the ordinary meanings for him and many others of 'masculine' and 'feminine' dramatically changed with the emergence of 'feminist criticism'. It would seem to me that during this event the adjectives 'feminine' and 'masculine' for White became empty shells for many purposes. These key words in our culture lost their meaning. (It may well be that it was not until after its publication in 1973 that White became uncomfortable with his universal use of male pronouns in *The Legal Imagination*. In the abridged edition, published twelve years later, White suggests that if he were to compose the book again he would 'change' the practice.) What purpose does Hartigan's repeated use of 'feminine' serve? She may want to do some gender-orientated bridge-building across the 'field', but to what extent is the chasm a problematic creation of her own making?

Conclusion

‘Conclusion’ is a title that doesn’t seem to fit particularly well here. ‘Provocations to rereading’ is one possible alternative, which is suggestive of a reintroduction. The word ‘rereading’ for present purposes includes ‘rewriting’, for this Conclusion can be taken to be a momentary pause in my own ongoing efforts to tune in to James Boyd White’s transformative constitutionalism.

* * *

Why put a great deal of time and energy into reading James Boyd White? Let me begin a response to that question, which I will connect to other questions that seem fitting for a reintroduction/conclusion.

In the early 1990s, after finishing my economics master’s thesis on efficiency and equity issues relating to acid rain, my supervisor, Martin O’Connor, suggested that I turn my attention to ‘home’, possibly to the organization and control of the New Zealand fisheries, giving particular attention to the place of indigenes. Whilst considering the suggestion, I made several inquiries, including one concerning the Water and Soil Conservation Act 1967. This statute had promoted a national policy in respect of natural water and provided for its conservation, allocation, use and quality. Section 21 of the Act gave the Crown the sole right, with limited exceptions, to dam rivers or streams, to use natural water, to divert natural water, or to discharge natural water or waste-water. The Act made no provision for indigenes to formally participate in decision-making. The ‘interests’ of indigenes could merely be an aspect of the general ‘public interest’ – under Section 24 (4): ‘Any person may lodge an objection to the application on the ground that the grant of the application would prejudice his interests or the interests of the public generally.’ In 1981, Parliament approved the first stages of an expansion project for New Zealand Steel Limited which included the use of a slurry pipeline to convey iron-sand from a mine at Maioro using water drawn from the Waikato River. After separation of the iron-sand and clarifying, the water would be discharged into the Manakau Harbour. The company applied for a right to

take water from the Waikato River. Nganeko Minhinnick of Ngati Te Ata, of a marae association Te Puaha Ki Manuka, and of the Huakina Development Trust, challenged the application. To the Planning Tribunal she argued that the pipeline would affect fishing in the Waikato River and cause deterioration in the water quality in the Manukau Harbour. She also considered the proposal to be culturally offensive: the mauri ('life force') of the two water bodies was incompatible – the waters of the Waikato should not be mixed with those of the Manukau.

Turner J, Chairman of the Planning Tribunal, insisted that whilst the Act required the Tribunal to take into account environmental damage, this damage was unrelated to the 'cultural and spiritual' matters:

But some Maori concerns are cultural and spiritual; they go beyond the mere physical environment. We have concluded that there is nothing in the Act which will allow us to take those purely metaphysical concerns into account. . . . May we add that other sections of the community also have spiritual values, many of which are not recognised, indeed are trampled on, by the community at large.¹

Turner J's words initially troubled me, and I would find myself returning to them on a number of occasions in an attempt to make sense of them. I came to sense that some fundamental issues (like, What are 'purely metaphysical concerns'?) needed to be addressed but had been closed off.

Minhinnick appealed. Before the hearing, she expressed her frustrations over the process and her anxieties about the outcome at a seminar sponsored jointly by the Commission for the Environment and the Centre for Maori Studies and Research:

In our dealings with government, with New Zealand Steel, with the Auckland Regional Authority and with other local government bodies, we have been made to go piecemeal, to go cap in hand as if we had no rights but were there to seek privileges to which we had no ancestral entitlement. We have been made to separate elements which cannot be separated, and to combine elements which cannot be combined. We have been reduced to one argument, to say that the new indignities that are proposed for our beloved harbour and river are transgressions of our Maori spiritual values: one such degradation is to mix the

¹ *Minhinnick v Auckland Regional Water Board* (Planning Tribunal, Decision A 116/81, 1981, 5).

Waikato River with the Manukau Harbour. Yet when we make that view known, we are told that spiritual values are not enough reason to stop a development. . . .

The Water and Soil Conservation Act makes no provision whatsoever for our values, and for our people. So, we have been on this merry-go-round, this mono-cultural merry-go-round, for four years, and we know that it is a waste of time, that the whole exercise is futile. We are currently waiting for a decision from the Planning Tribunal for the discharge rights sought to discharge the Waikato River into the Manukau Harbour. We know what that decision will be. . . .

The moment you let that water go out into the Manukau, you can come over to our marae Tahuna Kaitoto and bring a machine gun to mow us down – because once you do that there is nothing for us to live for. Once you do that, you’ve destroyed everything else, and now you really want to take away our very ancestral lives. That is what you will do in the process of mixing the river water and the harbour waters. We have tried so hard to tell you in your language, and we have tried so hard to tell you on paper, something else that we had not been brought up to do. . . . The Manukau is almost dead. But what do we ask you? We ask that you recognise that we exist.²

When I read these words for the first time I felt deeply troubled. How could ‘Maori’ be treated so badly? It did not take long to learn of an awful history of disempowerment and dispossession, which was done in the name of the law. *How could this be?* Why is this history not taught in schools? (I was shocked, to say the least.³) What was to become of the law?

With that last question in mind, I was better able to hear what John Commons was driving at. (I had used some of his ideas to talk about possible ways of resolving the acid rain dispute between Canada and America.) His ‘institutional’ economics had a real place for the Nganeko Minhinnicks of the world, a place that offered insight into how a person, or a ‘going concern’, can become downtrodden by the law and can also

² N Minhinnick, a korero in E M K Douglas, *Maori Perceptions of Water and the Environment*, Occasional Paper No. 27, November 1984. Centre for Maori Studies and Research, University of Waikato, 31-33.

³ When suggesting the topic of the fisheries to me, my supervisor said that particular attention might be given to the implementation of the system of Individual Transferable Quota (‘ITQ’). I recall being totally shocked when he claimed that the creation of this ‘so-called market’ was ‘legalized dispossession’. I discuss the ITQ ‘confiscation’ in my article ‘The Genesis of the New Zealand Parliament’s Treaty of Waitangi (Fisheries Claims) Settlement Act, 1992’ (2000) 1 *International Journal of Water* 80.

be given grounds for hope in the law.⁴ This place is the legal hearing, where lawyers have a responsibility for the reconstitution of language, law, and culture.

Whilst writing my economics doctoral thesis, I quickly came to appreciate that for many economists Commons' work did not count as 'real' economics. A question that I became preoccupied with was this: Why is it that economists cannot understand what Commons is driving at? Also, why is it that economists cannot understand what I am doing with Commons' work? I soon began to hear Minhinnick in me: 'I am being made to separate elements (economy, legality, polity) which cannot be separated . . . I have tried so hard to tell you in your language . . .'

When White's work came to my attention, I was delighted to come across a writer whose approach to law strongly resembled Commons' approach. And White's work on rhetoric provided me with insights on why economists misunderstand Commons. (A rhetorical approach to economics has explicitly addressed the matter of 'why Johnny (Ph.D., Economics) can't read'⁵ – it's a cultural phenomenon, which economists generally deem to be beyond the pale. When immersing myself in White's work, I was not surprised to hear various White critics failing miserably to do him justice – Levinson, Posner, Tushnet Perhaps failing to have a place for the Minhinnicks of the world (think of the place of Margaret Morgan in *Justice as Translation*), they simply failed to really listen. Also, I was not surprised to hear some critics sense that White was stunningly re-imagining and re-membering the law – Clark Cunningham and Herbert Eastman come immediately to mind, lawyers who have experienced the

⁴ Minhinnick correctly anticipated the outcome of the appeal. The Tribunal simply reiterated that 'the Act does not allow us to take account of Maori spiritual beliefs'. *Minhinnick v Auckland Regional Water Board* (Planning Tribunal, Decision A 119/84, 1984). At about this time, Minhinnick was introduced to Sian Elias – later Dame Sian, Chief Justice. (See D V Williams, "Purely Metaphysical Concerns", in Merata Kawharu (ed), *Whenua: Managing Our Resources* (2002) 289, 304. Elias managed to help dent the 'merry-go-round' – see *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188. Chilwell J accepted that a proper construction of the word 'interests' in the phrase 'the interests of the public generally' required that Maori cultural and spiritual values be included in the consideration of water right application proceedings. As all 'Laws 101' students today are expected to know by the end of their studies, the 'Huakina' judgment constituted a significant evolution of New Zealand law' – M McDowell and D Webb, *The New Zealand Legal System* (2006, 4th ed.) 191. The textbook would do well to attend to the dynamics of such evolution, the heart of which is linguistic/rhetorical creativity on the part of lawyers and judges.

⁵ W Waller and L R Robertson, 'Why Johnny (Ph.D., Economics) Can't Read: A Rhetorical Analysis of Thorstein Veblen And a Response to Donald McCloskey's *Rhetoric of Economics* (1990) 24 *Journal of Economic Issues* 1027.

activity of law at its less than best (think of Hattie Kendrick and of Dujon Johnson) and who hope to make transformations for the better.⁶

* * *

So, why read and reread White? A few weeks ago (I am writing these words on 10 June 2010) I came across an essay by Mary Ann Glendon that offers some food-for-thought in responding to that question. Here is one passage from the essay, *Why Cross Boundaries?* (1996):

A few years ago I came across a passage in an essay by a French historian that comes as close as anything I have seen to specifying the kind of ‘aha’ that legal comparatists regularly experience. Fernand Braudel put it this way: ‘Live in England for a year and you will not learn much about the English. But when you return to France you will see, in the light of your surprise, that which had remained hidden to you because it was so familiar.’ That . . . is what kept great comparatists like Max Rheinstein and John P. Dawson enthusiastic and productive right up to the end of their lives. There is something compelling about the experience of seeing something about our own legal system ‘in the light of [our] surprise,’ something that would probably have remained invisible to us without the perspective from another country, or culture, or from other disciplines such as literature, history, and economics. Then, as we reason about, and critically evaluate, what we have seen, we are off to the races: the recurrent steps in the dynamic, cumulative processes of human knowing. Those processes of experiencing, understanding, reasoning, and judging in turn lead to cognitive restructuring, higher viewpoints, and fresh insights. And so it goes.⁷

This passage brings to mind my first encounters with White’s work, especially his lecture *Economics and Law: Two Cultures in Tension* (1987). These encounters took place when I was living among economists, and reading White’s rendered strange their familiar talk. The invisible metaphors that the various tribes in economics live by suddenly became translucent – ‘aha’. By reading and rereading the self-identified ‘outsider’ I began to more fully understand the activities in which economists are

⁶ A discussion of Clark Cunningham’s engagement with Dujon Johnson did not make it into this Thesis. The engagement is discussed in C D Cunningham, ‘The Lawyer as Translator, Representation as Text: Towards and Ethnography of Legal Discourse’ (1992) 77 *Cornell Law Review* 1298.

⁷ M A Glendon, ‘Why Cross Boundaries?’ (1996) 53 *Washington and Lee Law Review* 971; reprinted in her *Traditions in Turmoil* (2006) 15, 19-20 (footnote omitted).

engaged. I kept reading White to keep experiencing the 'aha' experience. The cumulative impact of a series of 'aha' experiences was a significant change in the way I imagined 'the economy' and 'thinking like an economist'.

* * *

Speaking of legal comparatists, I suspect that a modern South African lawyer who is familiar with White's work would have little trouble in coming up with a positive response to the question 'Why read White?'. During the early 1990s in South Africa, a reconfiguration of thought and expression was called for in order to bury the apartheid regime. Then and now, lawyers seeking to contribute to the process of transformative constitutionalism would do well to begin with the character of legal education. In a Submission to the Truth and Reconciliation Commission, the dissenting lawyer Arthur Chaskalson, who helped defend Mandela in the Rivonia Trial, remarked:

Lawyers in South Africa were not generally trained in an analytical or jurisprudential tradition which led them to question the content or purpose of laws and the judicial function. Until the late 1970s, most law schools provided students with a monotonous diet of black-letter law. What is more the primary emphasis in most law degrees was on private law, in particular Roman-Dutch law and its development. Without doubt these law schools produced technically competent lawyers, but their education lacked an important component.⁸

The churning out of 'technically competent lawyers', who can follow a complex set of directions, can have profoundly disintegrative consequences on a culture if these lawyers lack an education worthy of the name. We can be sure that the 'monotonous diet of black-letter law' had no place for White's *The Legal Imagination*, which offers not the simple conveyance of information but a resource with which the reader can seek to work out a polytonal voice of her own, a voice that expresses a sense of self and of another and a just relationship between them.

* * *

⁸ A Chaskalson and others, 'Submission'; quoted in D Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Order* (1998) 81.

Working out a polytonal voice of one's own involves the activity of reading and rereading one's self. In *The Legal Imagination* White invites his reader to critically engage with her own writing. The engagement can be done in an educative spirit:

Part of an education is learning to be mortified by what one has just done, and it is only through a process of unsparing criticism of his own work that an athlete, a carpenter, a writer, a pianist, or a lawyer can make himself what he wants to be. One of the great things about the law is that it is an enterprise of writing, a constant opportunity for self-definition and self-improvement: how often one comes away bedraggled from a negotiation or an argument, asking why and how it went wrong, trying to see how one can make oneself different, someone who could do with language what one just failed to do.⁹

In writing and rewriting this Thesis, I have frequently come away bedraggled from negotiating the meaning of White's texts and of my texts on them. Developing the ability to 'do with language what one just failed to do' has been and continues to be a significant aspiration for me. We may hope that there are many lawyers and judges in South Africa today who have the same aspiration. Being 'mortified' by the operations of apartheid order, and by the role of lawyers and judges in it, could be important material for working at the activity of self-definition and self-improvement, which could be a driving force in a healthy transformative constitutionalism.

* * *

There is a sense in which rereading is an activity that we humans do all the time in ordinary life. White has said and suggested as much in his efforts to rehabilitate the ordinary. In a dialogue with Milner Ball, White offers these remarks:

For me reading of the kind I write about is always rereading: these are texts that have compelled and rewarded my attention, not just once but again and again, and in new ways when I come back to them at a later stage in life. I started reading Homer as an adult about twenty-five years ago, and I am still doing so; much the same could be said about Plato and Austen and Shakespeare. And I read for an education: that is, I read these works as written

⁹ *The Legal Imagination* 40.

by people, each situated a certain way in the world, and speaking to us; and I do this with the object of learning as much as I can from the activity in which they offer to engage us.

In doing this I give myself a set of memories that I can use to help understand and structure my own experience, both in law and elsewhere. By this I mean nothing esoteric: all of us, I think, make our way through life by bringing to bear on the present our memories of the past. We have heard this sentence, or that, in one version or another, a thousand times, and know how to read it when it comes again, whether as a surprise, a joke, or a deeply felt allusion. The same is true with social relations: we read this gesture of that against a background of prior gestures, from which it gets its meaning. . . . [A] family will develop its own language over time, made up of peculiar words, sentences, allusions, stories, all of which are ways of locating present experience in terms of the past. Reading does this too: I find myself constantly referring to Jane Austen, or Dickens, or Homer as a way of understanding and shaping the world I inhabit. In this way reading can be, as Kenneth Burke said, 'equipment for life.' This is no surprise for lawyers, for the common law has long been an elaborate and complex system for the memory and use of prior experience.¹⁰

This passage has compelled and rewarded my attention, not just once but again and again, and in new ways when I came back to it at different stages of writing this Thesis. In an early draft, the passage resided in the Introduction, serving as a point of departure for presenting White's interest in the process of integration. Now the passage can serve as component in an integrative summary for the road taken.

The process by which we 'make our way through life by bringing to bear on the present our memories of the past' is related to the process that we have called *attunement*. When I began teaching economics I was deeply dissatisfied with the dominant image of 'economic man', an image that has no place for the activity of attunement. White's work can help identify limits of this image and to imagine ways to improve it. Whilst trying to imagine a more meaningful economics I found myself constantly referring to White's work. Such an economics seems to go hand-in-hand with a more meaningful law, a law that takes 'the memory and use of prior experience' seriously. For me, the activities of law and economics are profoundly similar, though not in the way insisted upon by economic imperialists. Establishing and developing a healthy law and a healthy economics requires us to resist the imperialists. In this

¹⁰ *From Expectation to Experience* 153-5.

regard, tuning in to White's anti-imperialistic transformative constitutionalism seems a worthy road to take and make.

* * *

'Economics is a conversation, or rather a bunch of conversations.' So claims Arjo Klamer in *Speaking of Economics* (2007).¹¹ Klamer's metaphor of the discipline as 'a bunch of conversations' seems to me to be fitting, at least relative to others such as 'the body of accumulated knowledge', 'ideology', and 'a commodity traded in a market'.¹² His metaphor will be beyond the pale for economic imperialists, who seek to homogenize what counts as economics. How might the metaphor become more widely accepted? Could the metaphor constructively transform the discipline? An answer to those questions may be of value to those who imagine law as a bunch of conversations, as White does. An answer may also be of value to those South Africans committed to 'transformative constitutionalism' and who imagine that the transformation that desperately needs to take place can only be done in conversation.

I came away bedraggled after presenting some of my work on White, work that centered on the word 'conversation'. In asking myself how I could have improved the seminar, I found myself rereading Klamer. In *Negotiating a New Conversation about Economics* (1988), he reminds us that the word 'conversation', like all words, will have different meanings for different people. A greater shared meaning requires some attuning. He offers these words to assist in this process:

That metaphors matter and are more than ornament is also illustrated by reactions to the metaphors in the new conversation. 'Conversation,' 'argument,' 'rhetoric,' 'discourse,' and 'interpretation,' as terms to characterize the activities of economists, are metaphors that produce particular meanings, that is, connections with other things we know, with phrases that pop up in our mind, with things that we have read. Those meanings are not necessarily positive; Solow, for example, is bothered by the very suggestion that economics is 'like a conversation.' It sounds to permissive to him. In the context of the new conversation the use of these metaphors is intentional; They change the perspective on what economists do and produce new meanings. The intended references are to the writings of people like Ludwig Wittgenstein, Richard Rorty, Michel Foucault, Thomas Kuhn, Chaim Perelman, and Jürgen

¹¹ A Klamer, *Speaking of Economics: How to get in the conversation* (2007) 18.

Habermas. But as long as people associate ‘conversation’ with what usually happens in the drawing room, ‘rhetoric’ with ‘mere rhetoric,’ ‘argument’ with war, and ‘metaphor’ with ornament, we are in for difficult times.’¹³

Reading a text, or a set of texts, in the echo of another is the reader’s equivalent of metaphor, which is central to the process of attunement. Klammer’s text here can serve to draw attention to that putative fact and to help a White reader catch the tune of White’s use of the word ‘conversation’.

* * *

In the year 2000, White initiated a conversation with a collection of scholars from various disciplines – anthropology, classics, economics, history, law, philosophy, theology, among others – addressing the question, ‘How should we talk about religion?’ In 2006, the conversation produced a volume, which White edited.¹⁴ One of the chapters is Wayne Booth’s *Science versus Religion*, to which White gives these introductory remarks:

In this essay Wayne Booth faces head-on one of the deepest and most difficult problems relating to religion—namely, how to imagine a connection between that side of life and what we call ‘science,’ which seems to many to be so deeply opposed to it. If one talks like a scientist, there seems to be no respectable and respectful way to talk about religion; yet if one talks as some religious people do—as though a particular narrative or set of sacred texts or ritual practices state or embody the only real truth—it is impossible to talk respectfully and respectfully about science. Booth finds the beginning of an answer in what he calls a ‘rhetorological’ approach, one that tries to uncover the deepest commitments of contrasting ways of thinking and speaking, which in this case, he argues, demonstrates that true science and genuine religion share several deep and crucial understandings. On this basis it is possible to imagine a far more constructive conversation about the tensions and overlaps between science and religion than any we have yet enjoyed.¹⁵

¹² Ibid 20-25.

¹³ A Klammer, ‘Negotiating a New Conversation about Economics’ in in A Klammer, D N McCloskey, R M Solow (eds), *The Consequences of Economic Rhetoric* (1988) 265, 270.

¹⁴ J B White (ed), *How Should We Talk about Religion: Perspectives, Contexts, Particularities* (2006).

¹⁵ Ibid 144.

Well, ah, er, let us think about that word ‘rhetorological’. Would a rhetorologist by another name sound better? Could the name be of value for talking about what White does?

Booth, to recall, has been a leading contributor to the rehabilitation of ‘rhetoric’. His *The Rhetoric of Fiction* (1961) broadens the ordinary meaning of the word. For him, unlike many claims and suggestions to the contrary, an author ‘cannot choose whether to use rhetorical heightening’, for her ‘only choice is of the kind of rhetoric’ to be used.¹⁶ Booth here challenges the image of rhetoric as a ‘mere ornament’ and its associated image of the ignoble art of persuasion. For Booth, rhetoric can be noble or ignoble, or various mixtures of both.¹⁷ Against that background, in 1981, Booth put to work his new word ‘rhetorology’ whilst contributing to a colloquium on education:

The rhetorologist will be interested not so much in whether Mr. A or Mr. B wins a particular debate as in the structures of assumption and proof that both share, and in how these structures might differ from the structures found in neighboring disciplines, or in the same discipline a decade before or a decade after. You can see immediately that there are a lot of rhetorologists around, traveling under other names. Indeed in most disciplines these days one finds people who are reopening ‘settled’ questions about what constitutes good warrants for assent in that discipline—they are exploring the ways we think about the ways we think. . . .

To the rhetorician—though not to most other people—it has been clear for more than two thousand years that none of the individual disciplines provides a method for examining the basic assumptions necessary to the practice of that method. The lawyer does not use legal argument to establish the validity of legal argument; to do that requires some kind of political philosophy—either one derived from an established authority . . . or one discovered in symbolic intercourse among those who choose to think about such matters—that is, by rhetorology.¹⁸

¹⁶ W C Booth, *The Rhetoric of Fiction* (1961) 116.

¹⁷ In a later effort, Booth defines rhetoric as ‘the entire range of resources that human beings share for producing effects on one another: effects ethical (including everything about character), practical (including political), emotional (including aesthetic), and intellectual (including every academic field)’. W C Booth, *The Rhetoric of Rhetoric: The Quest for Effective Communication* (2004) xi.

¹⁸ W C Booth ‘Mere Rhetoric, Rhetoric, and the Search for Common Learning,’ in *Common Learning: A Carnegie Colloquium on General Education* (1981); reprinted in W C Booth, *The Vocation of a Teacher: Rhetorical Occasions, 1967 – 1988* (1988) 105, 106-126.

Booth here is making a case for a term for what he would later describe as the 'comparativist of rhetorics', the person 'who probes how disparate rhetorical practices and theories compete and are finally, inescapably related.'¹⁹ The word 'rhetorology' refers to 'the deepest practice' of 'listening-rhetoric', '[t]he whole range of communicative arts for reducing misunderstanding by paying full attention to opposing views.'²⁰ The ultimate aim here is to do *justice* to the rival rhetorics. Justice, we might say, begins 'by paying full attention'. Does that sound familiar?

For Booth, a fundamental question for those concerned with 'the rhetoric of rhetoric' is this: How should we talk about our talk? That question is one which can be asked in every walk of life. Booth's apparent imperialistic disposition emerges from his disposition to probe for common ground among communicators. If we are to reject his calls for a 'rhetorology' for any reason, how should we do so? Should we not make a place for the possibility that we have misunderstood him? Should we not make a place for a rhetorologist by imagining that we and he can be led to a mutual understanding?²¹

Shall we compare a good rhetorologist to a good judge? To a legal comparatist? To White? Placing 'rhetorologist' and 'White' together seems highly fitting to me. Beginning with *The Legal Imagination*, White has sought to uncover the deepest commitments of contrasting ways of thinking and speaking – law versus poetry, and so on. Should we not confer upon him the title of rhetorologist?

* * *

In the collection of contributions in the *Michigan Law Review* (2007) marking White's retirement, Jefferson Powell claimed that 'White is, above all, a teacher.'²² For Powell, White's *The Legal Imagination* 'made clear early on his passionate interest in the process of teaching and learning the law.'²³ The book, by his reading, diverges considerably from the familiar: 'Perhaps the strangest and the most wonderful casebook ever put

¹⁹ W C Booth, 'Our Best Rhetorologist' (1995) 19 *Philosophy and Literature* 116, 116.

²⁰ *The Rhetoric of Rhetoric*, op cit, 10.

²¹ In *The Rhetoric of Rhetoric* Booth defines rhetorology as follows: 'The deepest form of LR [listening-rhetoric]: the systematic probing for "common ground"' (11). And 'rhetorologist': 'The rhetorician who practices rhetorology, pursuing common ground on the assumption – often disappointed – that disputants can be led into mutual understanding' (ibid).

²² H J Powell, 'A Teacher' (2007) 105 *Michigan Law Review* 1393, 1393.

²³ Ibid.

together for use in a law school classroom, *The Legal Imagination* addresses not a discrete subject (contracts or torts or property) or a specific legal tool (for example, statutory interpretation) but an activity [of being a lawyer] that he has consistently described as bound up with what one can and cannot do with thought and language, and thus a subset of the activity of being human'.²⁴ In an effort to express his image of White as a 'teacher', Powell talked about White's book on reading George Herbert:

What it means to say that James Boyd White is, centrally, a teacher can be seen best, perhaps, in his one book that on its face has nothing to do with the law. '*This Book of Starres*' is, as its subtitle implies, a teaching book: it is an entire course, in print, on *Learning to Read George Herbert*. Herbert is, to be sure, an important figure in the history of English-language poetry, but I suspect that his American readership outside required survey courses in Eng. Lit. is mostly limited to those attracted by what White accurately describes as a 'sentimentalized' reading of Herbert as an exponent of a sweet (and indeed saccharine) piety. But that reading is false, as White shows, although he does so not through polemic but through a slow, painstaking attempt to hear what Herbert is actually saying in his poems, an attempt that White in turn shares with his readers. We have to *learn* to read Herbert rightly – and White's reader has no doubt that the 'we' here includes White himself – a difficult but compelling task in which White serves as resource, mentor, and challenge. White's objective, like that of any true teacher, is to empower the student to leave him behind, and '*This Book of Starres*' fully enacts that goal. White leaves the last Herbert poem he presents, entitled 'Love,' and beginning 'Love bade me welcome,' 'without comment, not because it does not warrant any but because it warrants so much . . . For us, let it stand as marking the point where I stop telling the reader what a poem means, leaving it wholly to him or her. In some sense all of *The Temple* [Herbert's collected poetry] leads up to this, and all of this book does to.' This comment perfectly captures Jim White's commitment to teaching in all his writing, his fervent belief that we can learn, and learn important things and important ways of living humanly, from the writing of others, and that there is not time to be wasted on false or disingenuous talk, including the falseness of pretending that all ways of talking, all ways of reading, are equally human and truthful.²⁵

Whilst 'on its face' White's book on Herbert 'has nothing to do with the law', reading it may help us re-imagine the law, in part through tuning in to White's various efforts to

²⁴ Ibid.

²⁵ Ibid 1395.

do so. Reading *'This Book of Starres'* may help us to read White's works rightly, not the least by helping us appreciate that a slow, painstaking attempt to hear what White is actually saying in his legal and cultural criticism is called for in order to begin to do him justice. I hope that a constructive beginning has been made in this Thesis.

* * *

White's book on learning to read Herbert has in some respects been a model for this Thesis on learning to read White. Here are some suggestive closing words from White's book:

In this reading we have been led outside of ourselves and our world to another position, broken out of what seems natural or familiar, and acculturated elsewhere. We cannot simply move from this language and mind back to what was our own—a part of the self and imagination remains on the island, singing its songs—and we cannot translate its terms into ours either. To create this very difficulty for ourselves is ultimately I think the reason for reading literature of this kind. We are given a brokenness of language and self that in some way parallels his, which is our task and opportunity to face.²⁶

White's use here of the first-person plural, 'we', speaks for me. I have joined him on a journey 'outside of ourselves and our world to another position, broken out of what seems natural or familiar, and acculturated elsewhere.' (Put differently, I had undergone an *alienation* from the commonplaces by which I had organized my life). Concerning this Thesis on White's work: In this reading we have been led outside of ourselves . . . and acculturated elsewhere. My hope is that you have found, or will find, this engagement with White to be useful in shaping your understanding of his transformative constitutionalism and thus useful in reconstituting the way in which you think and feel and speak as a human being, in and out of the law.

* * *

In a review of White's *'This Book of Starres'*, Wayne Booth remarked that it 'reads – this is one of its wonders – as if an exhilarated friend had just discovered a great author and was determined to persuade as many readers as possible to undergo an

²⁶ *'This Book of Starres'* 264.

experience something like a conversion.’²⁷ As a leading contributor to the rehabilitation of rhetoric, Booth has no difficulty with a design ‘to persuade’ and a relation of ‘friend’-ship.²⁸ I hope that you are persuaded, or at least are open to being persuaded, that there need not be an inherent conflict here, given that White’s book has served as a model for this Thesis.

* * *

The Latin root of the word conversion means to ‘turn around’ or ‘transform’, indicating the radical nature of this event.²⁹ White’s distinctive image of law explicitly has a conversion process at its heart, a process that is readily connectable to the phrase ‘transformative constitutionalism’. Consider the following passage, which comes from the final chapter of *From Expectation to Experience*, on ‘transformative . . . conversion’:

The law is transformative. It acts upon certain material—the problem or dispute or trouble brought by the client to the lawyer—which has one principle of organization and intelligibility, and converts it into something that has to be understood in very different ways. In a case like *Cohen v California*, for example, it converts a dispute about a vulgar motto on a jacket into a consideration of the fundamental nature of political speech in our society. In converting its material the law converts us as well, both speakers and listeners, as we come to inhabit the world this language and culture define. Conversion of this kind is a radical form of human activity, for which our word is art: we convert earth and oil into paintings that may change the imagination; pleasing sounds into music, not always pleasing, but sometimes incredible power and beauty; human actors and costumes and words into another dimension of reality, on the stage, with another claim on our attention altogether. So in the law: we convert immediate experience into the subject of thought of a particular kind, which has at its center the question of meaning: what this even means, and should mean, in the language of the law; and what that language itself means, as a way in which we articulate our deepest values and attain collective being. The life that gives meaning in such a way is itself a life of meaning.³⁰

²⁷ W C Booth, ‘Reading Poetry as Immersion: George Herbert and James Boyd White (1996) *Michigan Quarterly Review* 379, 381.

²⁸ In 1965, Booth identified ‘a general agreement’ among ‘the critics who have taken part in the revival of rhetorical studies that began in the mid-fifties’ that ‘to engage with one’s fellow men in acts of mutual persuasion, that is, of mutual inquiry, is potentially a noble thing.’ W C Booth, ‘The Revival of Rhetoric’ (1965) 80 *PMLA* 8, 9-10.

²⁹ J D Barbour, *Versions of Deconversion: Autobiography and the Loss of Faith* (1992) 1-2.

³⁰ *From Expectation to Experience* 182.

What White says here about 'the law' is transformative. He connects material from a legal case with materials from outside the law and converts them into a consideration of the fundamental nature of our 'collective being'. In converting these materials he converts us as we come to inhabit the world his language defines. We may be led to wonder how on earth some people imagine the study of the humanities to be irrelevant to law. If so, I suggest that a worthy conversion will have taken place.

* * *

At the outset of this journey I remarked that White is not a quick read and that to 'read' his work one must learn the language in which it is composed. What is involved in this activity? White's friend and former student Thomas Eisele offers these suggestive general remarks about learning language in *Wittgenstein's Instructive Narratives: Leaving the Lessons Latent* (1990):

Much of what we learn in learning language is not made explicit to us either in the teaching (or by our parents) or in the learning (by us as speakers). It may be *there*, in the language, but first we must soak it up, absorb it, experience it, and then only later do we realize it. Only later do we discover that we have learned, for example, how to say a word and make ourselves understood by others; how to construct a sentence and convey a thought; what the difference is between two words that express related yet no identical ideas; how to find the right word for the right occasion; when to speak and when to remain silent; how to project a word or concept into an unexpected but acceptable context; how to make a play on words; how to read contexts and determine what is appropriate to say within them; how to understand and take the implications of words uttered just here just now by just this person; and countless other lessons about the pliancy and availability (as well as the resiliency and durability) of language. What we learn about language is never simply what someone else teaches us about language, nor that which is explicit in the lesson taught or the example given. Rather, what we learn includes our ineffable, inarticulate experience of language *as* we learn it and as it matures within us (and as we mature within it). The implicit or latent is an irreducible component of learning language, and it is revealed gradually as we progress, maturing as speakers or writers or listeners, discovering the possibilities of the medium we

have inherited. Of course, this entails that we make something out of the legacy handed down to us; we have to *do* something with what we are given.³¹

We need only attend to our experience of engaging with White's work to appreciate that learning a language is not a mechanical exercise. We at first 'soak it up, absorb it, experience it', and then only later do we discover that we language differently than we did before. His 'language' was in a sense foreign to us to begin with, and now we have appropriated some of 'it', taking it 'in' and in letting it mature and shape what we feel and think and say. In the context of law school, we law students will orient ourselves to the next case and hope that we can maintain or improve the language of the law that we have inherited, in the name of *justice*.

* * *

Eisele's essay *The Activity of Being a Lawyer* (1987) offers some food-for-thought on the place of White's *The Legal Imagination* in relation to the collection of conversations called jurisprudence. At the outset, Eisele suggests that jurisprudence should integrate questions about the nature of law with questions about the possibilities for meaning in the law:

In asking what the nature of law is and why we should care, jurisprudence asks students to think again about what they are learning when they learn to do what a lawyer does. Thrown back upon themselves and their resources in grappling with the materials and quandaries that jurisprudence can make available to them, these students are expected to see more deeply into the law itself (the nature of its problems and its ways of solving them, its materials and their limits and possibilities), and to see more deeply into themselves (as writers, speakers, readers, arguers; as wordsmiths and problem-solvers). A jurisprudence course, on my view, does not seek to relieve law students from their professional quarrels with the law, but rather aims to place them ever deeper in the crucible of experience and to test their ability, in such a fix, to make something out of the law and out of themselves that approaches adequacy for the one and competency in the other.³²

³¹ T Eisele, 'Wittgenstein's Instructive Narratives: Leaving the Lessons Latent' (1990) *Journal of Legal Education* 86.

³² T D Eisele, 'The Activity of Being a Lawyer: The Imaginative Pursuit of Implications and Possibilities' (1987) 54 *Tennessee Law Review* 345, 347.

Eisele follows White in asking the standard question and inviting a non-standard response, one that invites each student to turn both inward and outward, to make and find a fitting 'place' for herself or himself in the world.

Following his teacher, one of Eisele's goals as a teacher of jurisprudence is to enhance the capacity of students 'to make connections between things, to discover and examine their relations, to hold them up for a study of their similarities and differences'.³³ This capacity concerns the 'imagination', a term that many lawyers and non-lawyers alike have placed and continue to place in opposition to 'reason' or 'rationality'. Eisele makes no such opposition. Eisele's jurisprudence has 'imagination' at its core:

Jurisprudence, if it to understand itself and its topic, the nature of law, must connect itself with other concepts and commitments and cares and concerns (i.e., with other human activities and fields). It is only through the discovery of such connections, the imaginative prodding and proposing of such connections, that we come to understand law for what it is, just as it is through such a process that we actually place law within the world of human life and activity, and locate ourselves along with it. By imaginatively investigating the implications and possibilities of the activity of law, we locate ourselves within it, with respect to it.³⁴

If we are to more fully understand White we must connect him and his commitments and cares with other lawyers and their commitments and cares. It is only through making connections that we come to more fully understand White for who he is. By placing him we place ourselves.

Eisele would not have us recognize 'law' as something already familiar to us. An imperial attitude is to be renounced. Making sense of 'law', and of 'ourselves', would seem to begin in explorative conversation. Through this conversation, in which we 'locate ourselves', we change ourselves, or, to use Eisele's terms, 'make something out' of ourselves.

* * *

³³ Ibid 348.

³⁴ Ibid 354.

‘For several decades, James Boyd White has been a unique voice in the law.’ That is the opening sentence of the *Michigan Law Review* collection marking White’s retirement.³⁵ Throughout this Thesis, White has been given a significant place to speak. His speaking voice, as I said at the outset, is the best definition of the living voice that he celebrates. Some legal academics would be deeply troubled with a significant amount of attention given to voice. ‘What on earth has aesthetics got to do with law?’, they ask in an incredulous voice.

That question brings to mind a story. Once upon a time, an army commander, during a battle, issued the command to his company in the trenches, ‘*Soldiers, attack!*’ He shouted those two words – the words have been translated from Italian – out in a loud voice so as to make himself heard in the middle of the turmoil. Nobody moved. The commander became angry and shouted louder: ‘*Soldiers, attack!*’ Still nobody moved. Incensed, he shouted even louder: ‘*SOLDIERS, ATTACK!*’ This third time brought forth a response. A barely audible voice arose from the trenches, saying, ‘*Che bella voce!*’ – ‘What a beautiful voice!’ What other response could possibly have come from opera lovers, people of refined taste who had ear training with *bel canto*?³⁶ My ‘rhetorical’ point is: isn’t all the attention on talk about voice missing a ‘legal’ point?

In *Acts of Hope*, White has a chapter on Emily Dickinson, outlining how she struggled with the authority of poetic convention. He tells us that she introduced ‘irregularities’ in poems that ‘jarred the contemporary ear’, irregularities generally thought to be ‘defective’, not ‘innovative’ as is now more commonly thought.³⁷ In concluding his chapter, White says this:

Her achievement was an act of courage and art not only on her own behalf but on behalf of all those . . . who feel that the language they have been given by their world to use is impossible: that it says all the wrong things, in the wrong way; that the self it invites or compels one to become is false, or wrong; that in it truth is not expressed but occluded. She was not a rebel for the sake of rebellion but because the forms in which she was asked to

³⁵ L C Bollinger, ‘The Imagination of James Boyd White’ (2007) 105 *Michigan Law Review* 1387, 1387.

³⁶ The story comes from M Dolar, *A Voice and Nothing More* (2006) 3–4. Dolar notes that ‘Italian soldiers . . . have an image of not being the most courageous soldiers in the world’ and as such it ‘is certainly not a model of political correctness – it indulges in tacit chauvinism and national stereotypes’ (3). No offence is intended here. Whatever the truth of the image, it seems to me that we might do well to consider the possibility that the image is suggestive of a virtue, namely the courageous resistance to the practice of dehumanization that is an integral part of war.

³⁷ *Acts of Hope* 224.

speak were not authentic to her and because authenticity was essential to her life. Her rebellion did not take the form of mere destruction but of transformation, a movement not away from discipline but towards an invented one. What she created was a new way of making poetry, beautiful and original, a new way of living with language. Against the conventional authorities she created new possibilities for poetry and for life and for these, as Plato does for dialectic, she claims an authority of her own. Not the kind of authority that consists of command . . . but the authority of a certain way of thinking, talking, and being.³⁸

White's words here seem to me to be strikingly fitting for White himself. Against the conventional authorities, White's living voice, which transcends disciplinary boundaries, has created new possibilities for law and for life and for these, as Dickinson does for poetry, he claims an authority of his own.

* * *

White's key word 'conversation' has troubled several of his critics, including Heinzelman, Levinson, and Mann. Let us draw stumps by giving more content to the word. Kenneth Burke's *The Philosophy of Literary Form* (1941) offers this striking image of the activity of conversation:

Imagine that you enter a parlor. You come late. When you arrive, others have long preceded you, and they are engaged in a heated discussion, a discussion too heated for them to pause and tell you exactly what it is about. In fact, the discussion had already begun long before any of them got there, so that no one present is qualified to retrace for you all the steps that had gone before. You listen for a while, until you decide that you have caught the tenor of the argument; then you put in your oar. Someone answers; you answer him; another comes to your defense; another aligns himself against you, to either the embarrassment or gratification of your opponent, depending upon the quality of your ally's assistance. However, the discussion is interminable. The hour grows late, you must depart. And you do depart, with the discussion still vigorously in progress.³⁹

As I remember reading for the first time White's lecture *Economics and Law*, I imagine myself entering a parlor. I do some listening, trying to catch the tenor of White's

³⁸ Ibid 269

³⁹ K Burke, *The Philosophy of Literary Form: Studies in Symbolic Action* (1941; 1973) 110-11.

argument. Some parts of the argument I simply don't understand, but I somehow catch enough of other parts, which I find captivating, to go on. As I do go on, I return to parts that I failed to catch, and I feel that I am slowly catching his larger drift. I then listen to several of White's interlocutors – Fish, Levinson, Mann, Posner, Tushnet – and I sense that they are failing to catch his drift. (There are some commentators – Ball, Brennan, Eisele, Gaakeer, LaRue, Teachout, among others – who have tuned in well.) I think carefully about putting in my oar. This Thesis can be imagined as part of my attempt to put in my oar. In doing so, I have reproduced some of White's argument that I have tried to catch. And I have reproduced some of his interlocutors' arguments. I hope to do White and his interlocutors *justice*. I hope that you, dear reader, feel that you are equipped to join in.

At the end of the Introduction to this Thesis, we heard from Milner Ball, who found himself in 'changing circumstances', not the least due to White's *The Legal Imagination*, which 'began a reconstitution of legal scholarship'. In terms of Burke's little story, *The Legal Imagination* can be imagined as one of White's oars. Like anyone, in putting in his oar, he transforms his inherited language and culture for those yet to come. White's transformation has opened up some extraordinary valuable possibilities for integrative thought and expression, in and out of the law. This Thesis is written out of an attempt to realize some of these possibilities and to help others to do the same, in their own ways.

Bibliography

Allen, G, *Intertextuality* (2000).

Allinson, R E, *Chuang-Tzu for Spiritual Transformation: An Analysis of the Inner Chapters* (1992).

Amar, A R, 'Of Sovereignty and Federalism' (1987) 96 *Yale Law Journal* 1425, 1453.

Austen, J, *Pride and Prejudice* (1813; 2004).

Austen, J, *Emma* (1816; 1996).

H Bai, 'Autonomy Reconsidered: A Proposal to Abandon the Language of Self- And Other-Control And to Adopt the Language of "Attunement"' (1998) *Philosophy of Education* 95.

Baird, T *The First Years: Selections from Autobiography* (1931).

Baird, T, 'Darwin and the Tangled Bank' (1946) *American Scholar*; reprinted in T Baird, *The Most of It: Essays on Language and the Imagination* (1999) 162.

Baird, T, 'The Freshman English Course' (1952) *Amherst Alumni News*; reprinted in T Baird, *The Most of It: Essays on Language and the Imagination* (1999) 199.

Bakhtin, M M, *The Dialogic Imagination* (1981) (ed M Holquist).

Bakhtin, M M, *Problems of Dostoevsky's Poetics* (1984) (ed and trans C Emerson).

Bakhtin, M M, 'The *Bildungsroman* and Its Significance in the History of Realism', in M M Bakhtin, *Speech Genres and Other Late Essays* (1986) 10.

Balkin, J M, 'Nested Oppositions' (1990) 99 *Yale Law Journal* 1669.

Ball, M S, Review (J B White, *The Legal Imagination*) (1977) 44 *University of Chicago Law Review* 681.

Ball, M S, 'Confessions' (1989) 1 *Cardozo Studies in Law & Literature* 185.

Ball, M S, 'The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater' (1975) 28 *Stanford Law Review* 81.

Barbour, J D, *Versions of Deconversion: Autobiography and the Loss of Faith* (1992).

Bell, R H, *Simone Weil: The Way of Justice as Compassion* (1998).

Berman, H J, 'The Origins of Historical Jurisprudence' (1994) 103 *Yale Law Journal* 1651.

Bigelow, G, *Fiction, Famine, and the Rise of Economics in Victorian Britain and Ireland* (2003).

Blair, W, *Mark Twain & Huck Finn* (1960).

Bollinger, L C, 'The Imagination of James Boyd White' (2007) 105 *Michigan Law Review* 1387.

Booth, W C, *The Rhetoric of Fiction* (1961).

Booth, W C, 'The Revival of Rhetoric' (1965) 80 *PMLA* 8.

Booth, W C, *Modern Dogma and the Rhetoric of Assent* (1974).

- Booth, W C, 'Freedom and Interpretation: Bakhtin and the Challenge of Feminist Criticism' (1982) *Critical Inquiry* 45.
- Booth, W C, 'Introduction', in M Bakhtin, *Problems of Dostoevsky's Poetics* (1984) (ed and trans C Emerson) xxi.
- Booth, W C, 'Mere Rhetoric, Rhetoric, and the Search for Common Learning,' in *Common Learning: A Carnegie Colloquium on General Education* (1981); reprinted in W C Booth, *The Vocation of a Teacher: Rhetorical Occasions, 1967 – 1988* (1988).
- Booth, W C, 'Our Best Rhetorologist' (1995) 19 *Philosophy and Literature* 116.
- Booth, W C, 'Reading Poetry as Immersion: George Herbert and James Boyd White (1996) *Michigan Quarterly Review* 379.
- Booth, W C, 'Why Banning Ethical Criticism Is a Serious Mistake' (1998) 22 *Philosophy and Literature* 366.
- Booth, W C, *The Rhetoric of Rhetoric: The Quest for Effective Communication* (2004).
- Booth, W C, *My Many Selves: The Quest for a Plausible Harmony* (2006).
- Bork, R, 'Judicial Precedent and the New Economics' in E Fox and J T Halverson (eds), *Antitrust Policy in Transition: The Convergence of Law and Economics* (1984) 16.
- Botha, H, 'Metaphoric Reasoning and Transformative Constitutionalism (part 1)' (2002) *Journal of South African Law* 612.
- Botha, H, 'Metaphoric Reasoning and Transformative Constitutionalism (part 2)' (2003) *Journal of South African Law* 20.
- Boudin, M, 'Antitrust Doctrine and the Sway of Metaphor' (1986) 75 *Georgetown Law Journal* 395.
- Boulding, K, *The Image: Knowledge and Life in Society* (1956).
- Boulding, K, 'A New Look at Institutionalism' (1957) 47 *American Economic Review* 1.
- Bowden, D, 'The Rise of a Metaphor: 'Voice in Composition Pedagogy' (1995) 14 *Rhetoric Review* 173.
- Breit, W, 'Galbraith and Friedman: two versions of economic reality' (1984) 7 *Journal of Post Keynesian Economics* 18.
- Brennan, P M, 'Realizing the Rule of Law in the Human Subject' (2002) 43 *Boston College Law Review* 227.
- Brennan, P M, 'Meaning's Edge, Love's Priority' (2003) 101 *Michigan Law Review* 2060.
- Brennan, P M, 'Asking the Right Questions: Harnessing the Insights of Bernard Lonergan for the Rule of Law' (2005) 21 *Journal of Law and Religion* 1.
- Brewer, S, 'Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy' (1996) 109 *Harvard Law Review* 923.
- Broderick, J H, 'A Study of the Freshman Composition Course at Amherst: Action, Order, and Language' (1958) 28 *Harvard Educational Review* 44.
- Brooker, P, *Bertolt Brecht: Dialectics, Poetry, Politics* (1988).
- Brooker, P, *A Glossary of Cultural Theory* (2002).
- Brower, R A, *The Fields of Light: An Experiment in Critical Reading* (1951; 1962).

- Burke, E, *Reflections on the French Revolution* (1790; 1898 – ed E J Payne).
- Burke, K, *The Philosophy of Literary Form: Studies in Symbolic Action* (1941; 1973).
- Burke, K, *A Grammar of Motives* (1945; 1969).
- Burke, K, *A Rhetoric of Motives* (1950).
- Busby, J *The Pre-Emption Land Question* (1859).
- Butterfield, R W, *Modern American Poetry* (1979).
- Carbone, J, 'What Do Women Really Want?: Economics, Justice, and the Market for Intimate Relationships' in M A Fineman and T Dougherty (eds), *Feminism Confronts Homo Economicus: Gender, Law, and Society* (2005) 405.
- Cavell, S, 'Naughty Orators: Negation of Voice in *Gaslight*', in S Budick and W Iser (ed), *Languages of the Unsayable* (1987).
- Charnock, R, 'Overruling as a Speech Act: Performativity and Normative Discourse' (2009) 41 *Journal of Pragmatics* 401.
- Clingman, S, *Bram Fischer: Afrikaner Revolutionary* (1998).
- Colenso, W, 'On a better Knowledge of the Maori Race' (1879) *Transactions and Proceedings of the New Zealand Institute* 128.
- Coleridge, S T, *Biographia Literaria* (1817; 1905).
- Commons, J R, *Legal Foundations of Capitalism* (1924; 1995).
- Commons, J R, *Institutional Economics: Its Place in Political Economy* (1934).
- Commons, J R, *The Economics of Collective Action* (1950).
- Coogan, M D, (ed), *The New Oxford Annotated Bible* (2001 – 3rd ed).
- Coughlan, D, 'Authenticity as first person practice: An exploration based on Bernard Lonergan' (2008) 6 *Action Research* 351.
- Cover, R M, 'The Supreme Court, 1982 Term – Foreword: *Nomos* and Narrative' (1983) 97 *Harvard Law Review* 1.
- Cover, R M, 'The Folktales of Justice: Tales of Jurisdiction' (1985) 14 *Capital University Law Review* 179, 181:
- Crumbley, P, *Inflections of the Pen: Dash and Voice in Emily Dickinson* (1997).
- Cunningham, C D, 'The Lawyer as Translator, Representation as Text: Towards and Ethnography of Legal Discourse' (1992) 77 *Cornell Law Review* 1298.
- Cunningham, C D, 'Learning From Law Students: A Socratic Approach to Law and Literature?' (1994) 63 *University of Cincinnati Law Review* 195.
- Cunningham, C D, 'Hearing Voices: Why the Academy Needs Clinical Scholarship' (1998) 76 *Washington University Law Quarterly* 85.
- Dawson, R, *Acid Rain and Economic Policymaking: An Institutional Interpretation*, M Com Thesis, University of Auckland (1992).

- Dawson, R, 'The Shacklean Nature of Commons's Reasonable Value' (1994) 17 *Journal of Post Keynesian Economics* 33.
- Dawson, R, 'Sovereignty and Withholding in John Commons's Political Economy' in W J Samuels (ed), *The Founding of Institutional Economics: The Leisure Class and Sovereignty* (1998).
- Dawson, R, 'Artificial Selection in Colonial New Zealand' (1999) 7 *Waikato Law Review* 73.
- Dawson, R, 'The Genesis of the New Zealand Parliament's Treaty of Waitangi (Fisheries Claims) Settlement Act, 1992' (2000) 1 *International Journal of Water* 80.
- Dawson, R, *The Treaty of Waitangi and the Control of Language* (2001).
- Dawson, R, 'Waitangi, Translation, and Metaphor' (2005) 2 *Sites: A Journal of Social Anthropology* 33.
- Dawson, R, *Waitangi, Law, and Justice: A Literary and Conversational Turn* (2006).
- Dawson, R, 'Doing Justice in "Takings" Cases: From Coal to Sand' (2006) 12 *Canterbury Law Review* 292.
- Dawson, R, 'Judging Economics Teaching and Textbooks' (2007) 60 *Journal of Australian Political Economy* 73.
- Dawson, R, 'Treaty of Waitangi Sovereignty-Talk: Lost Moments' (2008) 11 *Otago Law Review* 683.
- Dawson, R, 'The Common-Law Mind and Sovereignty-Talk, with Shakespeare's *King Richard II*' as an Analogical Source (2009) 15 *Canterbury Law Review* 237.
- Derrida, J, 'Racism's Last Word' (1985) 12 *Critical Inquiry* 290.
- Dewey, J, *Democracy and Education* (1916; 1966).
- Dewey, J, *Human Nature and Conduct: An Introduction of Social Psychology* (1922).
- Dewey, J, *Experience and Nature* (1925).
- Dewey, J, *Art as Experience* (1934).
- Dewey, J, *Experience and Education* (1938; 1955).
- Dillon, J T, 'Paper Chase and the Socratic Method of Teaching Law (1980) 30 *Journal of Legal Education* 529.
- Dolar, M, *A Voice and Nothing More* (2006)
- Douglas, E, *Maori Perceptions of Water and the Environment*, Occasional Paper No. 27, November 1984. Centre for Maori Studies and Research, University of Waikato, 31-33.
- Dow, S C, *Macroeconomic Thought: A Methodological Approach* (1985).
- D'Souza, D, 'The New Liberal Censorship' (1986) 38 *Policy Review* .
- Dutton, R, 'Shakespeare and Lancaster' (1998) 49 *Shakespeare Quarterly* 1.
- Dyzenhaus, D, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998).
- Earl, P E, *The Economic Imagination: Towards a Behavioural Analysis of Choice* (1983).
- Earl, P E, 'Indeterminacy in the Economics Classroom', in P E Earl and S F Frowen (eds), *Economics as an Art of Thought: Essays in Memory of G. L. S. Shackle* (2000) 38.

- Eastman, H, 'Speaking Truth to Power: The Language of Civil Rights Litigators' (1995) 104 *Yale Law Journal* 763.
- Eisele, T D, 'The Legal Imagination and Language: A Philosophical Criticism' (1976) 47 *University of Colorado Law Review* 363.
- Eisele, T D, 'The Activity of Being a Lawyer: The Imaginative Pursuit of Implications and Possibilities' (1987) 54 *Tennessee Law Review* 345.
- Eisele, T D, 'Must Virtue Be Taught?' (1987) *Journal of Legal Education* 495.
- Eisele, T D, 'Wittgenstein's Instructive Narratives: Leaving the Lessons Latent' (1990) *Journal of Legal Education* 86.
- Eisele, T D, 'The Poverty of Socratic Questioning: Asking and Answering in the *Meno*' (1994) 63 *University of Cincinnati Law Review* 221.
- Elias, S, 'Eulogy for the Lord Cooke of Thorndon' (2008) 39 *Victoria University of Wellington Law Review* 1.
- Eberhard, P, *The Middle Voice in Gadamer's Hermeneutics* (2004).
- Ferguson, R A, 'The Judicial Opinion as Literary Genre' (1990) 2 *Yale Journal of Law & the Humanities* 201.
- Finkelman, P, 'Sorting Out *Prigg v. Pennsylvania*' (1993) 24 *Rutgers Law Journal* 605.
- Finkelman, P, 'Slavery', in K L Hall (ed), *The Oxford Companion to The Supreme Court of the United States* (1992) 791.
- Fish, S, *Self-Consuming Artifacts: The Experience of Seventeenth-Century Literature* (1972).
- Fish, S, 'Comments From Outside Economics', in A Klammer, D N McCloskey, and R M Solow (eds), *The Consequences of Economic Rhetoric* (1988) 21.
- Fish, S, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) 474.
- Fish, S, *There's No Such Thing As Free Speech and it's a Good Thing, Too* (1994).
- Fishbane, M, *Sacred Attunement: A Jewish Theology* (2008).
- Fishman, S M, 'Explicating Our Tacit Tradition: John Dewey and Composition Studies' (1993) 44 *College Composition and Communication* 315.
- Fiumara, G C, *The Other Side of Listening: A Philosophy of Listening* (1990).
- Frame, A, 'Beware the Architectural Metaphor' in C James (ed), *Building the Constitution* (2000) 426.
- Frost, R, 'Education by Poetry' (1931) *Amherst Graduates' Quarterly*; reprinted in H Cox and E C Lathen (ed), *Selected Prose of Robert Frost* (1949; 1966) 33.
- Fuller, L L, 'The Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review* 616.
- Fuller, L L, *Legal Fictions* (1967).
- Fuller, L L, 'Reason and Fiat in Case Law' (1946) 59 *Harvard Law Review* 376.
- Fuller, L L, 'American Legal Philosophy at Mid-Century' (1954) 6 *Journal of Legal Education* 457.
- Gaakeer, J, *Hope Springs Eternal: An Introduction to the Work of James Boyd White* (1998) 17.

- Gaakeer, J, 'Interview with James Boyd White' (2007) 105 *Michigan Law Review* 1403.
- Gadamer, H, *Truth and Method* (1975).
- Gadamer, H, 'Aesthetic and Religious Experience', in *The Relevance of the Beautiful and Other Essays* (1986).
- Garet, R R, 'Gnostic Due Process' (1995) 7 *Yale Journal of Law & the Humanities* 97.
- Gasking, D A T, and A C Jackson, 'Wittgenstein as a Teacher' in K T Fann (ed), *Ludwig Wittgenstein: The Man and His Philosophy* (1967).
- Geyer, F, and W R Heinz (eds), *Alienation, Society, and the Individual: Continuity and Change in Theory and Research* (1992).
- Gibson, W, 'Literary Minds and Judicial Style' (1961) 35 *New York University Law Review* 915.
- Glancy, D J, 'Douglas's Right of Privacy: A Response to His Critics' in S L Wasby (ed), 'He Shall Not Pass This Way Again': *The Legacy of Justice William O. Douglas* (1984) 155, 160.
- Glendon, M A, *A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society* (1994).
- Glendon, M A, 'Why Cross Boundaries?' (1996) 53 *Washington and Lee Law Review* 971.
- Glendon, M A, *Traditions in Turmoil* (2006).
- Gohn, J B, 'Richard II: Shakespeare's Legal Brief on the Royal Prerogative and the Succession to the Throne' (1982) 70 *Georgetown Law Journal* 943.
- Goldfarb R S, and W B Griffith, 'The "Theory as Map" Analogy and Changes in Assumption Sets in Economics' in E Etzioni and P Lawrence (eds), *Socio-Economics* (1991).
- Goodrich, P, 'Rhetoric as Jurisprudence' (1984) 4 *Oxford Journal of Legal Studies* 88;
- Grassi, E, *Rhetoric as Philosophy: The Humanist Tradition* (1980).
- Gregory, R L (ed), *The Oxford Companion to the Mind* (1987).
- Hale, M, 'Considerations Touching the Amendment or Alteration of Lawes' in F Hargrave, *A Collection of Legal Tracts Relating to the Law of England* (1787) 253.
- Hall, P, 'The Buchanan Report: 40 Years On' (2004) 157 *Transport* 7, 11.
- Hall, S, *Representation: Cultural Representations and Signifying Practices* (1997).
- Hartigan, E F, 'From Righteousness to Beauty: Reflections on Poethics and Justice as Translation' (1992) 67 *Tulane Law Review* 455.
- Hendrix, H, *Getting the Love You Want: A Guide for Couples* (1988).
- Heinzelman, K, *The Economics of the Imagination* (1980).
- Hesse, M, *Models and Analogies in Science* (1996).
- Herbert, G, *The Temple*, in F E Hutchinson (ed) *The Works of George Herbert* (1941).
- Hersch, C, 'Bakhtin and Dialogic Constitutional Interpretation' (1994) 18 *Legal Studies Forum* 33.

- Hertz, R, 'Introduction: Reflexivity and Voice' in R Hertz (ed) *Reflexivity & Voice* (1997) vii.
- Huemer, W, 'Introduction: Wittgenstein, Language and Philosophy of Literature', in J Gibson and W Huemer, *The Literary Wittgenstein* (2004) 1.
- Hexter, J H, 'Property, Monopoly, and Shakespeare's *Richard II*', in P Zagorin (ed), *Culture and Politics: From Puritanism to the Enlightenment* (1980) 1.
- Hibbitts, B J, 'Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse' (1994) 16 *Cardozo Law Review* 229.
- Hodges, E P, 'Writing in a Different Voice' (1988) 66 *Texas Law Review* 629.
- Hodgson, G M, *Economics and Institutions: A Manifesto for a Modern Institutional Economics* (1988).
- Holderness, G, *Shakespeare Recycled* (1992).
- Hexter, J H, 'Property, Monopoly, and Shakespeare's *Richard II*', in P Zagorin (ed), *Culture and Politics: From Puritanism to the Enlightenment* (1980) 1.
- Holyoak, K J, and P Thagard, *Mental Leaps: Analogy in Creative Thought* (1995).
- Hutchinson, F E, (ed), *The Works of George Herbert* (1941).
- Jackson, M, "'Like a Beached Whale": A Consideration of Proposed Crown Actions Over Maori Foreshore', in L Pihama (ed), *Te Takutai Moana* (2003) 13.
- James, C, *Building the Constitution* (2000).
- James, W, *Principles of Psychology* (1890; 1981).
- Johnson, M, 'Some Constraints on Embodied Analogical Understanding', in D H Helman (ed) *Analogical Reasoning: Perspectives of Artificial Intelligence, Cognitive Science, and Philosophy* (1988) 25.
- Johnson, T H, *The Complete Poems of Emily Dickinson* (1890; 1960).
- Jouvenal, B, *Sovereignty: An Inquiry into the Political Good* (1957).
- Kalscheur, G A, 'Law School as a Culture of Conversion: Re-imagining Legal Education as a Process of Conversion to the Demands of Authentic Conversation' (1996) 28 *Loyola University Chicago Law Journal* 333.
- Keats, J, *Selected Poetry and Letters* (1969).
- Kierkegaard, S, *Either/Or* (Part II) (1843; 1987 – eds H V Hong and E H Hong).
- Kahn, E, 'Appointment of Justice Ismail Mahomed as Chief Justice' (1997) 114 *South African Law Journal* 197, 206.
- Keynes, J M, *The General Theory of Employment, Interest and Money* (1936; 1973).
- Kilgour, M, *From Communion to Cannibalism: An Anatomy of Metaphors of Incorporation* (1990).
- Kitching, G, *The Trouble with Theory: The Educational Costs of Postmodernism* (2008).
- Kronman, A, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993).
- Klamer, A, *The New Classical Macroeconomics: Conversations with the New Classical Economists and their Opponents* (1984) xi.

- Klamer, A, 'As If Economists and Their Subject Were Rational', in J J Nelson, A Megill, & D N McCloskey (eds), *The Rhetoric of the Human Sciences: Language and Argument in Scholarship and Public Affairs* (1987) 163.
- Klamer, A, 'Negotiating a New Conversation about Economics' in A Klamer, D N McCloskey, R M Solow (eds), *The Consequences of Economic Rhetoric* (1988) 265.
- Klamer, A, 'White's When Words Lose Their Meaning' (1990) 7 *Research in the History of Economic Thought and Methodology* 239.
- Klamer, A, *Speaking of Economics: How to get in the conversation* (2007).
- Klamer, A, and T C Leonard, 'So what's an economic metaphor?' in P Mirowski (ed), *Natural Images in Economic Thought: 'Markets read in tooth and claw'* (1994) 20.
- Klamer, A, and D McCloskey, 'Economics in the Human Conversation' in A Klamer, D N McCloskey, and R M Solow (eds), *The Consequences of Economic Rhetoric* (1988) 3.
- Klare, K E, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.
- Koschmann, T, and K Kuutti and L Hickman, 'The Concept of Breakdown in Heidegger, Leont'ev, and Dewey and Its Implications for Education' (1998) 5 *Mind, Culture, and Activity* 25.
- Kovach, M, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (2009).
- Kupfer, G E, 'Margaret's Missing Voice: Using Poetry to Explore Untold Stories in the Law' (2000) 21 *Women's Rights Law Reporter* 177.
- Lakoff, G, and M Johnson, *Metaphors We Live By* (1980).
- LaRue, L H, 'What is the Text in Constitutional Law: Does it Include Thoreau?' (1986) 20 *Georgia Law Review* 1137.
- LaRue, L H, 'Writing Across the Margins: An Introduction' (1996) 53 *Washington and Lee Law Review* 943.
- Langa, P, 'Transformative Constitutionalism' (2006) 3 *Stellenbosch Law Review* 351.
- Langer, S K, *Philosophy in a New Key: A Study in the Symbolism of Reason, Rite, and Art* (1942).
- Levi, E, *An Introduction to Legal Reasoning*, Chicago (1949).
- Levinson, S, '"The Constitution" in American Civil Religion' (1979) *Supreme Court Review* 123, 135.
- Levinson, S, 'Conversing About Justice' (1991) 100 *Yale Law Journal* 1855.
- Lewis, C S, *Surprised by Joy* (1955; 1976).
- Little, J P, 'Simone Weil's Concept of Decreation', in R H Bell (ed), *Simone Weil's Philosophy of Culture: Readings toward a divine humanity* (1993).
- Locke, J, *An Essay Concerning Human Understanding* (1671; 1962) 106.
- Lonergan, B J F, *Insight: A Study of Human Understanding* (1957).
- Lucas, R, 'Unemployment Policy' (1978) 68 *American Economic Review* 353; reprinted in R Lucas, *Studies in Business Cycle Theory* (1981) 240.
- MacIntyre, A, *After Virtue* (1982).

- Mahomed, I, 'Address by the Honourable Mr Justice Ismail Mahomed at a Dinner given by the Johannesburg Bar on 25 June 1997 to celebrate his Appointment as Chief Justice of the Supreme Court of Appeal' (1997) 114 *South African Law Journal* 604.
- Mäki, U, 'Reorientating the Assumptions Issue' in R E Backhouse (ed), *New Directions in Economic Methodology* (1994) 236.
- Mandela, N, *Long Walk to Freedom* (1994).
- Marcus, G E, and M M J Fischer, *Anthropology as Cultural Critique: An Experimental Moment in the Human Sciences* (1986).
- McCloskey, D N, *The Rhetoric of Economics* (1985).
- McCloskey, D N, 'The Essential Rhetoric of Law, Literature, and Liberty' (1991) 5 *Critical Review* 203.
- McCloskey, D, N, *Knowledge and Persuasion in Economics* (1994) 56.
- McCloskey, D N, 'The Missing Ethics in Economics' in A Klammer (ed), *The Value of Culture: On the Relationship between Economics and Arts* (1996) 187.
- McCloskey, D, 'The Demoralization of Economics: Can We Recover from Bentham and Return to Smith?', in M A Fineman and T Dougherty (eds), *Feminism Confronts Homo Economicus: Gender, Law, and Society* (2005) 20.
- McCutcheon, F, *Religion Within the Limits of Language Alone: Wittgenstein on Philosophy and Religion* (2001).
- McShane, P, *Introducing the thought of Bernard Lonergan* (1968).
- McDonnell, J, "'A Little Spirit of Independence": Sexual Politics and the Bildungsroman in *Mansfield Park*' (1984) 17 *Novel: A Forum on Fiction* 197.
- McLeod, B, 'Rules and Rhetoric' (1985) 23 *Osgoode Hall Law Journal* 303.
- Mercuro, N, and S G Medema, *Economics and the Law: From Posner to Post-Modernism* (1997).
- Meynell, H A, *An Introduction to the Philosophy of Bernard Lonergan* (1976).
- Mill, J S, 'On Liberty' (1859), in *Utilitarianism* (1982) (ed M Warnock) 134.
- Minda, G, 'Cool Jazz but Not so Hot Literary Text in Lawyerland: James Boyd White's Improvisations of Law and Literature' (2001) 13 *Cardozo Studies in Law and Literature* 157.
- Misak, C J, *Truth and the End of Inquiry: A Peircean Account of Truth* (1991).
- Miller, J H, *Poets of Reality: Six Twentieth-Century Writers* (1965).
- Mieder, W, "'A House Divided": From Biblical Proverb to Lincoln and Beyond', in W S Brown (ed), *Understanding Wisdom: Sources, Science, & Society* (2000) 57.
- Moi, T (ed), *The Kristeva Reader* (1986).
- Moon, P, *FitzRoy: Governor in Crisis* (2000).
- Mootz, F J, 'Foreword' (2000) 76 *Chicago-Kent Law Review* 719.
- Murienik, E, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

- Mooney, E, *Selves in Discord and Resolve: Kierkegaard's Moral-Religious Psychology From Either/Or to Sickness Unto Death* (1996).
- Moretti, F, *The Way of the World: The Bildungsroman in European Culture* (1987).
- Munz, P, 'The Rhetoric of Rhetoric' (1990) 51 *Journal of the History of Ideas* 121.
- Myrdal, G, *An American Dilemma: The Negro Problem and Modern Democracy* (1944; 1996) 75-6.
- Naickamparambil, T, *Through Self-Discovery to Self-Transcendence: A Study of Cognitive Self-Appropriation in B. Lonergan* (1997) 45.
- Naylor, E W, *Shakespeare and Music* (1896; 1931) 32.
- Neale, W C, 'Language and Economics' (1982) 16 *Journal of Economic Issues* 355.
- Oakeshott, M, *Rationalism in Politics and Other Essays* (1962).
- Oldenquist, A, 'Autonomy, Social Identities, and Alienation', chapter 3, pp. 53-60, 56. F Geyer and W R Heinz (eds), *Alienation, Society, and the Individual: Continuity and Change in Theory and Research* (1992).
- Ong, W J, *Ramus, Method, and the Decay of Dialogue: From the Art of Discourse to the Art of Reason* (1958).
- Ong, W J, *Interfaces of the Word: Studies in the Evolution of Consciousness and Culture* (1977).
- Oster, J, 'Frost's Poetry of Metaphor' in R Faggen (ed), *The Cambridge Companion to Frost* (2001) 155.
- Osborne, J J, *Paper Chase* (1971).
- Panichas, G A (ed), *The Simone Weil Reader* (1977).
- Pearce, D, 'Cost-Benefit Analysis and Environmental Policy' (1998) 14 *Oxford Review of Economic Policy* 84.
- Perelman, C, *The Idea of Justice and the Problem of Argument* (1963) 134;
- Perelman, C, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning* (1980) 120.
- Perelman C and L Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (1958; 1969).
- Peters, M A, 'Writing the Self: Wittgenstein, Confession, and Pedagogy', in M A Peters, N C Burbules, and P Smeyers (eds), *Showing and Doing: Wittgenstein as a Pedagogical Philosopher* (2008) 131.
- Pierce, C S, *Collected Papers of Charles Sanders Peirce* (eds C Hartshorne and P Weiss) (1934).
- Plant, S, *Simone Weil* (1996).
- Plato, 'Crito', in *The Last Days of Socrates* (trans H Tredennick and H Tarrant) (1993).
- Posner, R A *Economic Analysis of Law* (1972; 1992, 4th ed).
- Posner, R A, 'Wealth Maximization and Judicial Decision-Making' (1984) 4 *International Review of Law and Economics* 131.
- Posner, R A, *Law and Literature: A Misunderstood Relation* (1988).
- Posner, R A, *The Problems of Jurisprudence* (1990).
- Posner, R A, 'The New Institutional Economics Meets Law and Economics' (1993) *Journal of Institutional and Theoretical Economics* 73.

- Posner, R A, *Overcoming Law* (1995).
- Posner, R A, *Law and Literature: Revised and Enlarged Edition* (1998).
- Posner, R A, *How Judges Think* (2008).
- Powdermaker, H, *Stranger and Friend: The Way of an Anthropologist* (1966).
- Powell, H J, 'A Teacher' (2007) 105 *Michigan Law Review* 1393.
- Ramstad, Y, 'A Pragmatist's Quest for Holistic Knowledge: The Scientific Methodology of John R Commons' (1986) 20 *Journal of Economic Issues* 1067.
- Ramstad, Y, 'On the Nature of Economic Evolution', in L Magnusson (ed), *Evolutionary and Neo-Schumpeterian Approaches to Economics* (1994) 65.
- Rawls, J, *A Theory of Justice* (1971).
- Robinson, D, *Becoming a Translator: An Accelerated Course* (1997).
- Rokeach, M, *The Open and Closed Mind: Investigations into the Nature of Belief Systems and Personality Systems* (1960).
- Rorty, R, *Philosophy and the Mirror of Nature* (1979).
- Rose, N, *Governing the Soul: The Shaping of the Private Self* (1989) 240.
- Roux, T, 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference' (2009) *Stellenbosch Law Review* 258.
- Salmon, J, *A History of Goldmining in New Zealand* (1963).
- Salmond, J W, 'Introduction' in E Brunken and L Register (trans), *Science of Legal Method* (1917; 1921).
- Samuels, W J, 'The Legal-Economic Nexus' (1989) 57 *George Washington Law Review* 1556.
- Samuels, W J, 'Part-Whole Relationships' in G M Hodgson, W J Samuels, and M R Tool (eds), *The Elgar Companion to Institutional and Evolutionary Economics* (1994) II, 142.
- Samuels, W J, 'Signs, Pragmatism, and Abduction: The Tragedy, Irony, and Promise of Charles Sanders Peirce' (2000) 34 *Journal of Economic Issues* 207.
- Samuels, W J, and N Mercuro, 'Posnerian Law and Economic on the Bench' (1984) 4 *International Review of Law and Economics* 107; reprinted in W J Samuels, *Essays on the Economic Role of Government* (1992) vol 2, ch 2.
- Samuels, W J, and N Mercuro, 'Wealth Maximization and Judicial Decision-Making: The Issues Further Clarified' (1986) 6 *International Review of Law and Economics* (1986) 133.
- Schoenfeldt, M C, *Prayer and Power: George Herbert and Renaissance Courtship* (1991).
- Schön, D A, *The Reflective Practitioner: How Professional Think in Action* (1983) 21.
- Schweitzer, D, 'Marxist Theories of Alienation and Reification: The Response to Capitalism, State Socialism and the Advent of Postmodernity', chapter 3, pp. 27-52. F Geyer and W R Heinz (eds), *Alienation, Society, and the Individual: Continuity and Change in Theory and Research* (1992).
- Schroeder, L L, 'Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination' (1991) 70 *Texas Law Review* 109.

- Self, P, *Econocrats and the Policy Process: The Politics and Philosophy of Cost-Benefit Analysis* (1975) 5.
- Shade, P, *Habits of Hope: A Pragmatic Theory* (2001).
- Shakespeare, W, *A Midsummer Night's Dream* (c 1595) in J Bate and E Rasmussen (ed), *William Shakespeare: Complete Works* (2007).
- Shakespeare, W, *Much Ado About Nothing* in (1598; 2007) (eds J Bate and E Rasmussen).
- Shakespeare, W, *King Richard II* (ed A Gurr) (c 1595; 1990).
- Shakespeare, W, *Troilus and Cressida* (circa 1601-02; 1982) (ed K Muir).
- Smith, A, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776; 1937).
- Smith, L T, *Decolonizing Methodologies: Research and Indigenous Peoples* (1999).
- Smith, S D, 'Science, Humanity, and Atrocity: A Lawyerly Examination' (2006) 104 *Michigan Law Review* 1305.
- Soifer, A, 'Reviewing Legal Fictions' (1986) 20 *Georgia Law Review* 871, 872.
- Soifer, A, 'Covered Bridges' (2005) 17 *Yale Journal of Law & the Humanities* 55.
- Steiner, G, *Language and Silence* (1967).
- Sullivan, S, 'Reconfiguring Gender with John Dewey: Habit, Bodies, and Cultural Change' (2000) 15 *Hypatia* 23.
- Stern, D G, 'Heraclitus' and Wittgenstein's River Images: Stepping Twice into the Same River' (1991) 74 *Monist* 579.
- Stern, D G, *Wittgenstein's Philosophical Investigations: An Introduction* (2004).
- Stiglitz, J E, and C E Walsh, *Economics* (1993; 2002).
- Sunstein, C R, 'On Analogical Reasoning' (1993) 106 *Harvard Law Review* 741.
- Taylor, C A, 'Kirkegaard and the Ironic Voices of Emily Dickinson' (1979) 77 *Journal of English and German Philology* 569.
- Taylor, J, and P Dalziel, *Macroeconomics – New Zealand Edition* (2002) 15
- Teachout, P R, 'Worlds Beyond Theory: Toward the Expression of an Integrative Ethic for Self and Culture' (1985) 83 *Michigan Law Review* 849.
- Teachout, P R, 'The Soul of the Fuge: An Essay on Reading Fuller' (1986) 70 *Minnesota Law Review* 1073.
- Teachout, P R, 'Strains of Music: Understanding the Speech of the *Nomoi* in Plato's *Crito*' (1994) *University of Cincinnati Law Review* 51.
- Todd, R, *The Opacity of Signs: Acts of Interpretation in George Herbert's The Temple* (1986).
- Tracy, D, *The Analogical Imagination: Christian Theology and the Culture of Pluralism* (1981).
- Tracy, D, *Plurality and Ambiguity: Hermeneutics, Religion, Hope* (1987).
- Tushnet, M V, 'Translation as Argument' (1990) 32 *William and Mary Law Review* 105.

- Tutu, D, et alia, *Truth and Reconciliation Commission of South Africa Report* (1998; 1999).
- Twain, M, *The Adventures of Huckleberry Finn* (1884; 1985 – Penguin Classics).
- Vaihinger, H, *The Philosophy of 'As if': A System of the Theoretical, Practical and Religious Fictions of Mankind* (trans C K Ogden) (1924).
- Van der Walt, A J, 'Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State' (2001) 118 *South African Law Journal* 258, 259.
- Varnum, R *Fencing with Words: A History of Writing Instruction at Amherst College during the Era of Theodore Baird, 1938-1966* (1996).
- Veith, G E, *Reformation Spirituality: The Religion of George Herbert* (1985).
- Vendler, H, *The Poetry of George Herbert* (1975).
- Vining, J, *The Authoritative and the Authoritarian* (1986).
- Vining, J, *From Newton's Sleep* (1995).
- Vining, J, *The Song Sparrow and the Child: Claims of Science and Humanity* (2004).
- Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (2004).
- Waller, W, and L R Robertson, 'Why Johnny (Ph.D., Economics) Can't Read: A Rhetorical Analysis of Thorstein Veblen And a Response to Donald McCloskey's *Rhetoric of Economics* (1990) 24 *Journal of Economic Issues* 1027.
- Weaver, R M, *The Ethics of Rhetoric* (1953; 1985).
- Webb, E, *Philosophers of Consciousness: Polanyi, Lonergan, Voegelin, Ricoeur, Girard, Kierkegaard* (1988).
- Weil, S, 'The *Iliad*, or The Poem of Force' (1945) 2 *Politics* 321.
- Weil, S, *Waiting for God* (1951; 1973).
- Weil, S, *First and Last Notebooks* (trans R Rees) (1970) 351.
- Weil, S, *Lectures on Philosophy* (trans H Price) (1978).
- Weinrib, E J, 'Obedience to the Law in Plato's *Crito*' (1982) 27 *American Journal of Jurisprudence* 85.
- Weisskopf, W A, 'The Method Is the Ideology: From a Newtonian to a Heisenbergian Paradigm in Economics' (1979) 13 *Journal of Economic Issues* 869.
- West, R, 'Communities, Texts, and Law: Reflections on the Law and Literature Movement' (1988) 1 *Yale Journal of Law & the Humanities* 129.
- West, R, 'Mikhail Bakhtin and Change in the Common Law' (1997) 72 *Washington Law Review* 291.
- White, J B, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (1973).
- White, J B, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (1984).
- White, J B, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (1985).

- White, J B, 'Doctrine in a Vacuum: Reflections on What a Law School Ought (and Ought Not) to Be' (1985) 18 *University of Michigan Journal of Law Reform* 251.
- White, J B, 'Judicial Criticism' (1986) 20 *Georgia Law Review* 835.
- White, J B, 'Economics and Law: Two Cultures in Tension' (1987) 54 *Tennessee Law Review* 161.
- White, J B, 'Rhetoric and Law: The Arts of Cultural and Communal Life', in J J Nelson, A Megill, & D N McCloskey (eds), *The Rhetoric of the Human Sciences: Language and Argument in Scholarship and Public Affairs* (1987).
- White, J B, 'What Can a Lawyer Learn from Literature?' (1989) 102 *Harvard Law Review* 2014.
- White, J B, *Justice as Translation: An Essay in Cultural and Legal Criticism* (1990).
- White, J B, "'Our Meanings Can Never Be the Same': Reflections on Language and Law' (1991) 21 *Rhetoric Society Quarterly* 68.
- White, J B, 'Translation as a Mode of Thought' (1992) 77 *Cornell Law Review* 1388.
- White, J B, *Acts of Hope: Creating Authority in Literature, Law, and Politics* (1994).
- White, J B, 'Imagining the Law', in A Sarat and T R Kearns (eds), *The Rhetoric of Law* (1994) 29.
- White, J B, *'This Book of Starres': Learning to Read George Herbert* (1994).
- White, J B, 'Why I Write' (1996) 53 *Washington and Lee Law Review* 1021.
- White, J B, *From Expectation to Experience: Essays on Law & Legal Education* (1999).
- White, J B, *The Edge of Meaning* (2001).
- White, J B, 'What's Wrong with Our Talk about Race?: On History, Particularity, and Affirmative Action' (2002) 100 *Michigan Law Review* 1927.
- White, J B, *Living Speech: Resisting the Empire of Force* (2006).
- White (ed), J B, *How Should We Talk about Religion: Perspectives, Contexts, Particularities* (2006).
- White, L A, 'Science is Sciencing' (1938) 5 *Philosophy of Science* 369, 369.
- Williams, D V, 'The Queen v Symonds Reconsidered' (1989) 10 *Victoria University of Wellington law Review* 385.
- Williams, R, *Keywords: A Vocabulary of Culture and Society* (1976; 1983).
- Winston, K I, (ed), *The Principles of Social Order: Selected Essays of Lon L Fuller* (1981) 297.
- Winter, S L, 'Bull Durham and the Uses of Theory' (1990) 42 *Stanford Law Review* 639.
- Wittgenstein, L, *Philosophical Investigations* (1953).
- Wolcher, L E, *Law's Task: The Tragic Circle of Law, Justice and Human Suffering* (2008).
- Woodhouse, B B, 'Mad Midwifery: Bringing Theory, Doctrine, and Practice to Life' (1993) 91 *Michigan Law Review* 1977.
- Worton, M, and J Still (eds), *Intertextuality: Theories and Practices* (1990).

Index

Cases

Adair v United States, 208 US 161 (1908): 212-15.
 Attorney-General v Ngati Apa [2003] 3 NZLR 643: 365-7.
 Boyd v United States, 116 US 616 (1886): 496.
 Cohen v California, 403 US 15 (1971): 64-73, 375.
 Donoghue v Stevenson [1932] AC 562: 357-61.
 Griswold v Connecticut 381 US 479 (1965): 400-4, 436-0.
 Hoani Te Heuheuk Tukino v Aotea District Maori Land Board [1941] NZLR 590: 366 (n 35).
 Holden v Hardy, 169 US 366 (1898): 478-9.
 Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188: 514 (n 4).
 Kauwaeranga (1870) 4 Hauraki MB 236: 247-50.
 Lochner v New York, 198 US 45 (1905): 476-80.
 McCulloch v Maryland, 4 Wheat. (17 US) 316 (1819): 185-91, 329, 494.
 McKeever v Israel, 689 F2d 1315 (7th Cir. 1982): 384.
 Merrit v Faulkner, 697 F2d 761 (7th Cir. 1983): 384.
 Minhinnick v Auckland Regional Water Board (Planning Trib, Decision A 116/81, 1981): 511.
 Minhinnick v Auckland Regional Water Board (Planning Trib, Decision A 119/84, 1984): 514.
 Olmstead v United States, 277 US 438 (1928): 494-8.
 Planned Parenthood v Casey, 505 US 833 (1992): 257-62, 440-1.
 Poe v Ullman, 367 US 497 (1961): 437-39.
 Prigg v Pennsylvania, 16 Pet. (41 US) 539 (1842): 111-20, 337.
 Re the Ninety-Mile Beach [1963] NZLR 461: 366-7.
 Scott v Sandford, 19 How. (60 US) 393 (1857): 279-81.
 United States v White, 401 US 745 (1971): 332.
 Wi Parata v Bishop of Wellington (1877) 3 NZ Jur (NS) SC 72: 362-66.

Names

Aristotle, 469-70.
 Austen, Jane, 53-56, 198-207.
 Baird, Theodore, 319, 321-2, 409-18, 507-8.
 Bakhtin, Mikhail, 50, 160, 489.
 Balkin, Jack, 76-7.
 Ball, Milner, 17-18, 62-3, 261-2, 325-6, 517-8, 527, 531.
 Becker, Gary, 285-6.
 Benthon, Jeremy, 460.
 Bollinger, Lee, 19, 529.
 Booth, Wayne, 98, 408 (n58), 464-5, 489-90, 520-22, 524-25.
 Botha, Henk, 391-4, 404.
 Boudin, Michael, 389-90.
 Boulding, Kenneth, 13, 265-71, 283, 286.
 Brecht, Bertolt, 61-2.
 Brennan, Patrick, 11, 192 (n 56), 428-30, 531.
 Brower, Reuben, 19-22, 24.
 Burke, Edmund, 6, 180-5.
 Burke, Kenneth, 14 (n 36), 459-61, 530-31.

Chaskalson, Arthur, 516.
Commons, John, 13, App 1-6, 139-44, 90, 212-15, 269, 301-5, 380-2, 430-2.
Cover, Robert, 314, 334-7, 396-7.
Cunningham, Clark, 196-8.
Dewey, John, 25 (n 14) 164, 298-300, 445 (n 31).
Dickinson, Emily, 99-100, 342, 529-30.
Dyzenhaus, David, 291, 312-18, 345.
Earl, Peter, 83-88.
Eastman, Herbert, 337-42.
Eisele, Thomas, 33, 197 (n 4), 526-28, 527.
Fischer, Bram, 292, 314, 316, 473.
Finn, Huckleberry, 221-40, 503.
Fish, Stanley, 7-8, 144-49, 252-56, 531.
Frost, Robert, 16, (n 43), 319-21, 371, 485.
Fuller, Lon, 316, 317, 345-7, 350.
Gaakeer, Jeanne, 264, 531.
Gadamer, Hans-Georg, 374-5, 439-40.
Gibson, Walker, 481-6, 508-9.
Glendon, Mary Ann, 316 (n 70), 515.
Hale, Matthew, 178-80.
Harlan, John, 64-73, 437-41.
Hartigan, Emily, 7, 505-9.
Heinzelman, Kurt, 305-6.
Heinzelman, Susan, 286-90, 530.
Hendrix, Harville, 375-8.
Herbert, George, 136-42, 307-9, 523.
Homer, 10, 56-60.
Hooker, Richard, 174-78, 244-5.
James, William, 37, 97, 102.
Johnson, Mark, 407.
Kalscheur, Gregory, 11 (n 26), 401 (n 38).
Keynes, J M, App 7-8.
Kirkegaard, Soren, 39, 100 (n 12), 135-36.
Klamer, Arjo, 13, 14, 44-6, 103-6, 143-47, 272-4, 404-7, 465-9, 504, 519-20.
Klare, Karl, 1 (n 4), 357.
Kovach, Margaret, 15.
Kupfer, Gabi, 119-20.
Lakoff, George, 407.
Langa, Pius, 2.
LaRue, Lewis, 333-37, 531.
Levi, Edward, 75-6, 78.
Levinson, Sanford, 7, 257, 333-5, 403, 502-5, 530.
Lincoln, Abraham, 275-81.
Lonergan, Bernard, 11, 21, 25-6.
Mahomed, Ismail, 1, 351-7.
Mandela, Nelson, 1, 5, 168, 216-8, 342, 446-7, 473, 516.
Mann, Susan, 7, 203-7, 211, 530.
Marx, Karl, 460.
McCloskey, Donald/Deirdre, 13, 46-7, 271-2, 310-11.
Minhinnick, Nganeko, 512-13.
Munz, Peter, 475-6.
Neale, Walter, 430-1.
Oakeshott, Michael, 481.

O'Connor, Martin, 511
Ong, Walter, 333, 462-4, 498 (n 46).
Peirce, Charles Sanders, 300-1, 505.
Plato, 417-27.
Posner, Richard, 7, 88-92, 94-5, 167-71, 192, 207-8, 218, 282, 304-5, 343-4, 378-88, 408, 432-3, 476-7, 480, 482, 498-9, 504-5, 514.
Powell, Jefferson, 522-23.
Rapping, Leonard, 272-75.
Salmond, John, 361-2.
Samuels, Warren, 12, 382-7.
Sen, Amartya, 447-8.
Shakespeare, William, 125-35, 177-8, 296-7.
Smith, Adam, 446.
Socrates, 217, 417-27.
Sophocles, 448-57.
Stern, David, 490-2.
Stiglitz, Joseph, 435-6.
Teachout, Peter, 328-29, 347-8, 424-7, 531.
Thoreau, Henry, 123-4.
Thucydides, 26-7, 441-5, 470-1.
Tracy, David, 80-3, 504.
Tushnet, Mark, 7, 118-9, 120, 209-11, 332-3, 499-501.
Twain, Mark, 221-40.
Van der Walt, Andre, 395-8.
Varnum, Robin, 507-9.
Vining, Joseph, 75, 154-55.
Weil, Simone, 7, 106-11.
Weisberg, Richard, 505-6.
West, Robin, 236-7.
Wittgenstein, Ludwig, 17, App 8-9, 30-3, 160, 167, 490-2, 499-501.